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In the Supreme Court of the United States

OCTOBER TERM, 1985

CROUNSE CORPORATION, ET AL.,
PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RICHARD A. ZELLNER
MARK E. STAIB
SMITH R. BRITTINGHAM, III
HAHN LOESER & PARKS
800 National City E. 6th Bldg.
Cleveland, Ohio 44114

A. DUNCAN WHITAKER, P.C.
ALAN M. WISEMAN
ROBERT M. BRUSKIN
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JAMES F. BROMLEY
BROMLEY, BROWN & WALSH
1625 Eye St., N.W.
Washington, D.C. 20006

WILLIAM L. PATTON
Counsel of Record
THOMAS H. HANNIGAN, JR.
ROPES & GRAY
225 Franklin Street
Boston, MA 02110
(617) 423-6100

WILLIAM E. HYNAN
PETER A. GABAUER
1130 17th St., N.W.
Washington, D.C. 20036

NICHOLAS J. SPAETH
LYNN L. SCHLOESSER
MARY ANN JOHNSON
State Capital
Bismark, N. Dakota 58505

Counsel for Petitioners

Blanchard Press, Inc., Boston, Mass. — Law Printers [617] 426-6690

QUESTIONS PRESENTED

Section 11321 of the Interstate Commerce Act, 49 U.S.C. § 11321 (originally enacted as section 11 of the Panama Canal Act of 1912 and referenced hereinafter as the "Act") prohibits a railroad from acquiring any interest in a water carrier with which it does or may compete for traffic that moves on a water route served by the water carrier unless the railroad establishes that the acquisition will not reduce such competition. In this case the Interstate Commerce Commission ("ICC") has approved the acquisition of the nation's largest barge line by the nation's second largest railroad, although finding that they directly competed for traffic. The Court of Appeals sustained the ICC's approval, holding that the ICC was not required to analyze the acquisition's effect on rail-barge competition. The Court of Appeals also held that competition among barge carriers would not be reduced within the meaning of the Act unless barge lines would be completely driven from the water route. In this context, the questions presented are:

1. Whether the Court of Appeals erred by holding that under the Act, which precludes railroad acquisitions of competing water carriers unless competition will not be reduced, the ICC can ignore the impact on rail-barge competition in determining whether to approve the acquisition.

2. Whether the Court of Appeals erred by holding that under the Act a railroad acquisition of a competing water carrier does not reduce competition unless other water carriers will be driven completely out of the market.

PARTIES

The seventeen petitioners consist of shippers (Tampa Electric Company and Gatliff Coal Company); associations representing shippers (National Coal Association, The National Grange, and The National Association of Wheat Growers); water carriers (Crounse Corporation, The Ohio River Company, M/G Transport Services, Inc., Canal Barge Company, Inc., Dixie Carriers, Inc., The Valley Line Company, S.C. Loveland Company, Inc., SCNO Barge Lines, Inc., and TECO Transport & Trade Corporation); associations representing water carriers (The Water Transport Association, and The American Waterways Operators, Inc.); and the State of North Dakota.[1] These petitioners were either petitioners or intervenors urging reversal of the ICC's decision in the Court of Appeals.[2] The respondents and intervening parties urging affirmance of the ICC's decision in the Court of Appeals consisted of the ICC, the United States, CSX Corporation and American Commercial Lines, Inc.

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[1] Information concerning petitioners required by Rule 28.1 of the Rules of the Supreme Court is set forth in Appendix G to this petition, 219a. The appendix to this petition has been separately bound and filed in this Court.

[2] Other petitioners or intervenors below who urged reversal were PPG Industries, Inc., Interstate Power Co., Tennessee Valley Authority, Patrick W. Simmons (Illinois Legislative Director for United Transportation Union), the National Marine Service, Inc., and the Mining and Reclamation Council of America.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals majority (App. A, 1a-31a) and the dissenting opinion of Judge Timbers (App. A, 32a-41a) are officially reported at 781 F.2d 1176. The dissenting opinions of Judges Merritt and Jones from the denial of rehearing *en banc* (App. D, 44a-46a) are officially reported at 787 F.2d 1031. The decision of the Interstate Commerce Commission (App. E, 47a-210a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (App. B, 42a) was entered on January 23, 1986. A petition for rehearing with suggestion for rehearing *en banc* was denied in an order entered March 28, 1986 (App. C, 43a). This order was amended on April 11, 1986 to include a four-page dissent by Judge Merritt, joined by Judges Keith, Martin, and Jones, and a separate dissent by Judge Jones (App. D, 44a-46a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTES INVOLVED

Section 11 of the Panama Canal Act of 1912, Ch. 390, § 11, 37 Stat. 566, currently codified at 49 U.S.C. § 11321 (1982), provides in pertinent part:[3]

> (a)(1) Notwithstanding sections 11343 and 11344 of this title, a carrier, or a person controlling, controlled by, or under common control with a rail, express, sleeping car, or pipeline carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may not own, operate, control, or have an interest in a water common carrier or vessel carrying property or passengers on a water route with which it does or may compete for traffic.
>
> * * * *

[3] In 1978 Congress restated and codified the entire Interstate Commerce Act without making any substantive change. Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3, 92 Stat. 1337, 1446. Prior to codification section 11 of the Panama Canal Act was located at 49 U.S.C. § 5(15)-(17) (1976). This provision is substantially the same as the text of the Act as originally adopted and contains the governing language and meaning of the statute as embodied in section 11321. *See* H.R. Rep. No. 1395, 95th Cong., 2d Sess. 4 (1978). The full text of the original Act as well as the Act before and after the 1978 codification is reproduced in Appendix F, 211a-218a.

(b) Notwithstanding subsection (a) of this section, the Commission may authorize a carrier providing transportation subject to the jurisdiction of the Commission under that subchapter to own, operate, control, or have an interest in a water common carrier or vessel that is not operated through the Panama Canal and with which the carrier does or may compete for traffic when the Commission finds that ownership, operation, control, or interest will still allow that water common carrier or vessel to be operated in the public interest advantageously to interstate commerce and that it will still allow competition, without reduction, on the water route in question. . . .

STATEMENT

This case involves the acquisition of American Commercial Lines, Inc. ("ACL"), which owns the nation's largest barge line, by CSX Corporation ("CSX"), the nation's second largest railroad and the largest rail carrier east of the Mississippi.[4] The acquisition of ACL by CSX was a by-product of events involving a hostile tender offer in 1983 by Coastal Corp. to acquire the stock of Texas Gas Transmission Company ("Texas Gas"), a natural resources company which is the parent corporation of ACL. Texas Gas sought a so-called "white knight," and on June 9, 1983, CSX made a tender offer for the stock of Texas Gas as part of an agreement and plan of merger between CSX and Texas Gas which would result in CSX ownership and control of ACL.

Since CSX's acquisition of ACL required ICC approval and since no application for approval had been filed, CSX and Texas Gas agreed to place the ACL stock in a voting trust which was submitted to the ICC on June 10, 1983, and, after

[4] CSX is a railroad holding company resulting from the merger of the Chessie System Railroads, the Seaboard System Railroad, and the Richmond, Fredericksburg and Potomac Railroad. *CSX Corp.*, 363 I.C.C. 518 (1980).

modification, again on June 14, 1983. Litigation then ensued before the ICC and subsequently in the District Court and the Court of Appeals for the District of Columbia Circuit challenging the use of the voting trust device. *See Water Transport Association* v. *ICC*, 715 F.2d 581 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984). The Court of Appeals, Judge Greene dissenting, sustained the ICC's use of the voting trust device without addressing the merits of the underlying acquisition.

On November 4, 1983, CSX applied to the ICC under the Panama Canal Act, 49 U.S.C. § 11321 (1982), for approval to acquire ACL. Numerous shippers, states, utilities, water carriers and labor organizations opposed the application.[5] Some shippers and states supported the application (App. A, 3a). Hearings were held before an administrative law judge, but he made no findings of fact and rendered no recommended decision.

The ICC approved CSX's acquisition of ACL on August 27, 1984. The approval marks the first time in the seventy-four year history of the Act that the ICC has approved the acquisition by a railroad of a competing water carrier. In approving the acquisition, the ICC overruled its longstanding interpretation of the Act and ignored the impact of the acquisition on rail-barge competition between CSX and ACL.[6]

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[5] (App. A, 3a). The acquisition was opposed by a broad spectrum of the shipping public, including the Tennessee Valley Authority, the United States Department of Agriculture, the states of West Virginia, Minnesota, Oklahoma, and North Dakota, the leading agricultural trade groups, shippers representing utilities, chemical manufacturers, firms engaged in the iron and steel business, and the bulk of the nation's coal producers through the Mining and Reclamation Council and The National Coal Association. (App. E, 66a-69a, 162a-164a).

[6] In approving the acquisition, the ICC purported to impose so-called "reporting and oversight conditions" which, according to the ICC, would permit it "to take corrective action, if necessary to deal with any anti-competitive effects" which might manifest themselves after the merger (App. E, 146a). There is no statutory authorization for the imposition of conditions

CSX and ACL are giants in their respective industries. The vast scope of their operations was aptly summarized in the dissenting opinion of Circuit Judge Timbers in the Sixth Circuit:

> CSX and its rail subsidiaries operate over 27,000 miles of track. CSX is the leading carrier of solid bulk commodities by any mode. In 1981, for example, CSX moved 541 million tons of traffic. This constituted one-half of all coal and chemical shipments and nearly one-third of all agricultural products shipped by rail in the eastern United States. Most importantly, CSX controls primary access to one-half of all the rail/barge coal-loading capacity on the Ohio River system, including *all* of the terminals along one important 300 mile stretch of the Ohio River. CSX and two other railroads account for 86% of *all* eastern Class I rail revenues. Revenues for 1982 totalled nearly $5 billion, with net income for that year amounting to $338,400,000.
>
> ACL operates its barge lines over 7,500 miles of the 15,000 miles of inland waterways. ACL is the nation's largest line-haul bargeline. ACL is one of the top three for-hire bargelines in the transport of coal, chemicals and agricultural products on the inland waterways. ACL and five other carriers transport 70% of *all* eastern coal shipments to utilities along water routes. ACL's revenues for 1982 totalled $295,000,000 with net income for that year amounting to $21,000,000.

(App. A, 33a-34a).

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in a Panama Canal Act case. Moreover, the notion that rail-barge ownership should be allowed, subject to ICC regulation, is an approach that was specifically rejected by Congress when the Bourne amendment was defeated in the course of passage of the Act. Instead, Congress deliberately chose to declare common ownership unlawful and adopted the broadly worded general prohibition contained in the Act. *See* 48 Cong. Rec. 10586 (1912); H.R. Rep. 1197, 62d Cong. 2d Sess. 6-7 (1912).

Prior to the acquisition, CSX and ACL competed directly for the transport of bulk commodities, including coal, grain, and liquid chemicals. CSX tracks intersect and parallel the waterways served by ACL, as shown in the map following page 25. As noted by Judge Timbers (App. A, 34a), CSX and ACL competed directly for customers in 12 states and 59 metropolitan areas (including Chicago, Cincinnati, Louisville, Memphis, Mobile, New Orleans and Pittsburgh). Thirty utility plants, including those operated by the Tennessee Valley Authority, have the capacity to be serviced by either CSX or ACL. These two carriers competed for shipments to and from 163 points along the inland waterway system and to and from points within a band extending from 25 to 200 miles on either side of the water route. As a result of the acquisition, all head-to-head, or horizontal, competition between CSX and ACL has been eliminated.

The acquisition also reduced competition for traffic moving in part by rail and in part by water. Even the ICC conceded that CSX has the "interest and ability" to divert to ACL, and away from independent water carriers, traffic it delivers to the river for onward water movement (App. E, 117a). And, as Judge Merritt observed in his dissent from the denial of rehearing *en banc*:

> [CSX] controls 50% of the barge terminals on the river system in question, and all of the terminals on large stretches thereof. If, after buying [ACL] the railroad restricts the use of its terminals to [ACL], it will eliminate competition among barge lines that haul coal and other commodities to and from those terminals. Given the number of terminals involved, it is inconceivable that the merger in question will not result in a reduction of competition on the water routes in question.

(App. D, 45a).

In reviewing the transaction under the Act, the ICC was first required to determine if CSX and ACL compete for traffic. The ICC necessarily answered that question in the affir-

mative: "CSX and [ACL] do actively compete for the same traffic for the same shippers." (App. E, 93a). The ICC then proceeded to determine whether the acquisition satisfied the narrow exception to the general prohibition against rail-barge mergers contained in the Act. That exception required that the railroad satisfy two stringent tests: first, that the acquisition of ownership "will still allow that water common carrier or vessel to be operated in the public interest advantageously to interstate commerce"; and second, "that it will still allow competition, without reduction, on the water route in question." The ICC concluded "that, due to the highly competitive nature of the barge industry and the relative ease of entry associated with it, no reduction in competition will occur." (App. E, 52a).[7] In making that determination, the ICC for the first time in the history of the Act failed to analyze the overall reduction of rail-barge competition resulting from the merger and looked only to the impact of the acquisition on barge-barge competition.

Review was sought in the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 2342 (1982). On January 23, 1986, the Court of Appeals, in a two-to-one decision, affirmed the ICC's approval of the acquisition. The majority held that the Act was merely "meant to remedy a particular evil which frequently accompanied railroad acquisition of bargelines"— namely, the evil of predatory pricing (App. A, 7a). The majority recognized that if Congress intended to do more than simply remedy the evil of predatory pricing, it would be "difficult to interpret a narrow statutory exception to encompass a merger between companies the size of CSX and ACL." (*Id.*, 6a-7a, 10a). The majority proceeded, however, to do precisely that.

Having determined that the purpose of the Act was the narrow one of preventing predatory pricing, the majority then ruled that the ICC had properly construed the Act to require

[7] The ICC also found that the public interest test was satisfied but in so doing it erroneously attributed no independent substance to the requirement, indicating that in its view the public interest test "is closely related to the competition test." (App. E, 121a).

only analysis of harm to competition among barge lines and not to competition between barge lines and railroads (App. A, 13a). The majority also held that barge-barge competition would not be reduced unless the impact of the acquisition was to drive independent barge carriers completely out of business. (*Id.*, 8a, 14a).

Circuit Judge Timbers dissented:

> [I]n my view the ICC has erroneously interpreted and applied the Panama Canal Act, 49 U.S.C. § 11321 (1982) (the "Act"), so as to approve for the first time during the seventy-three year history of the Act the acquisition by a railroad of a bargeline. Today's decision by our Court is one of first impression among the courts of the United States, for no court has ever approved such an acquisition. The acquisition in question is one of enormous importance; it concerns the acquisition by the nation's second largest railroad (CSX Corporation) of American Commercial Lines, Inc. (ACL), which owns the nation's largest bargeline. In approving the acquisition, the ICC rejected and overruled its own prior controlling decisions.

(App. A, 32a). According to Judge Timbers, the "essential, and fatal, error upon which the ICC's decision is based, is its utter failure to consider the effect of this acquisition on competition between railroads and bargelines." (*Id.*, 33a). He characterized the ICC's failure to consider rail-barge competition as "curious" and "result oriented," and stated that the "ICC's convenient manipulation of the facts and the law to reach the result it did in the instant case strikes me as nothing short of astounding." (*Id.*, 33a, 35a).

A petition for rehearing with suggestion of rehearing *en banc* was denied by the Sixth Circuit in an order entered on March 28, 1986 (App. C, 43a). Circuit Judge Merritt, joined by Judges Keith, Martin, and Jones, issued a four-page dissenting opinion. Judge Merritt stated, *inter alia*, that:

> I believe that we should have granted rehearing en banc in this important antitrust case. Congress has enacted a law flatly prohibiting a merger between a railroad and a barge line if that merger results in *any* reduction in competition. Never before has a railroad been permitted to merge with a competing barge line, regardless of the political cast or regulatory philosophy of the Commission or the antitrust philosopy of the courts. Yet in this case the Interstate Commerce Commission has refused to look at what effect the merger of the largest railroad east of the Mississippi with the largest barge line in the nation will have on rail-barge competition, and at whether the lessening of rail-barge competition will lead to a lessening of competition among barge lines. As Judge Timbers correctly observes in his dissent, such refusal is an "abdication of responsibility on the part of the ICC" that "makes a mockery of its regulatory functions." Slip Op. at 40. We do not perform our judicial function when we uphold it.

(App. D, 44a-45a).

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision sustaining the acquisition of the nation's largest barge line by the nation's second largest railroad is, as Judge Timbers stated, "one of first impression among the courts of the United States" and concerns an acquisition "of enormous importance" (App. A, 32a). The approval of the CSX-ACL acquisition is significant not only because of its magnitude standing alone, but also because of what it portends. The Sixth Circuit effectively conceded that approval of this acquisition will "allow almost any rail-barge merger." (*Id.*, 10a). If permitted to stand, the decision will fundamentally alter the structure of surface transportation competition in the United States with profound economic and legal implications that Congress affirmatively sought to prohibit.

The economic impact of this case is national in scope. Surface transportation in the United States has been characterized in recent years by two notable events. First, successive rail mergers have left the nation with only three major railroads in the eastern United States, each basically serving separate regions of the country.[8] The result has been to curtail competition among railroads, and most shippers (over 85% in the case of coal) have become captive to a single railroad (*See* App. A, 37a). Second, Congress has removed rail ratemaking from close regulatory scrutiny and the railroads have obtained new freedom from rate regulation. As these developments have occurred, intermodal competition has become even more important, in lieu of regulation, to safeguard against railroad abuse of market power.

Independent barge transportation is the primary, and only direct, source of competition faced by rail carriers for the long haul of bulk commodities such as coal, grain, ores, and chemicals—vital raw materials that underpin the national economy. The competitive position of independent barge transportation has provided the public with a low cost alternative to rail service and, as a result, has stimulated rate competition, product innovation, and service efficiencies, all inuring to the benefit of shippers and the public which they ultimately serve.[9] As Judge Merritt observed in dissenting from the denial of rehearing *en banc*:

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[8] In contrast, in 1958, there were 57 Class I line haul railroads in the East. The same situation exists west of the Mississippi, where there are now only four primary railroads: the Burlington Northern, Union Pacific, Santa Fe and Southern Pacific. The proposed consolidation of the latter two railroads is now pending before the ICC.

[9] In the legislative history of the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1980), Congress explicitly recognized these benefits from independent water carrier competition. The Senate Committee Report explained:

> Throughout the Interstate Commerce Act there are numerous provisions which illustrate prior congressional recognition of the importance of [the] rail-water competitive relationship. We believe that the benefit to the public of rail-water competition and coordination is hundreds of millions of dollars in freight rate savings which are passed through to the consumer. Moreover, pressures of competition improve the efficiency of both rail and water modes. . . . Practices which undermine such healthy competition are contrary to this congressional recognition.

S. Rep. No. 470, 96th Cong., 1st Sess. 30 (1979).

"In terms of its economic impact, this case is significant. Our decision will affect the price of coal, grain, and other commodities for many years in the Ohio and Tennessee Valleys and beyond." (App. D, 45a).

The legal implications of the Court of Appeals' decision are equally significant. This acquisition was approved by the ICC under the Panama Canal Act, a specialized antitrust statute embodying a basic policy generally prohibiting common ownership of competing rail and water carriers. Although the preservation of rail-barge competition is the focus of the Act, the Court of Appeals has ruled that the ICC need not consider the impact of a rail-barge consolidation on rail-barge competition. The Court of Appeals further ruled that in analyzing the impact of the acquisition on water carriers, the acquisition may be approved unless it will result in the complete destruction of other water carriers. The decision of the Court of Appeals is manifestly contrary to the purpose and language of the Act as it has been understood and applied by the ICC and the Courts in the seventy-four year history of the statute. Unless the decision is reversed, the intent of Congress will have been nullified and the ICC allowed to arrogate to itself the functions of the legislative branch.

Finally, the decision is contrary to the National Transportation Policy as it has evolved at the hand of Congress. 49 U.S.C. §§ 10101, 10101a (1982). Congress has redefined the National Transportation Policy from time to time, adopting differing statutory approaches to accomplish its objectives. However, although Congress has repeatedly revisited the matter, it has left the Panama Canal Act's general prohibition of common ownership of competing rail and water carriers unchanged. This has not been inadvertent. Thus, while Congress has moved to encourage rail-rail consolidations, it has repeatedly refused to change the Act and has consistently relied on the competition provided by the independent barge carriers as an important means of constraining railroad market power. Like-

wise, this Court and the ICC have recognized that independent barge competition was an important factor which has permitted the ICC to approve rail-rail consolidations. *Penn-Central Merger Cases*, 389 U.S. 486, 501 (1968); *CSX Corp.*, 363 I.C.C. 518, 568-69, 573 (1980). Furthermore, when Congress adopted the Staggers Act, it chose to rely on independent barge competition, in lieu of regulation, as a predicate for deregulating rail rate making. See pp. 22-23, *infra*.

This case presents important federal questions concerning the Act and its relationship to the National Transportation Policy which should be settled by the Court.[10]

I. The Court Of Appeals Erred In Ruling That The ICC Was Not Required To Consider The Impact Of The Acquisition On Rail-Barge Competition

A. The Court Of Appeals' Decision Is Contrary To The Language, Structure, And Purpose Of The Act

The Court of Appeals fundamentally misconstrued the Act by holding that the ICC was not required to consider the effect of the acquisition on rail-barge competition and could limit its analysis to competition among barge lines (App. A, 13a). The Court of Appeals' decision contradicts the language and internal logic of the statute, violates Congress' intent, and disregards the competitive realities inherent in this case.

Congress expressly prohibited railroad control and required railroad divestiture of water carriers with which the railroad

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[10] This is not the first time the Supreme Court has been asked to correct an ICC misconstruction of a statute designed to protect water carriers from anticompetitive and abusive practices by competing railroads. *E.g.*, *ICC* v. *Mechling*, 330 U.S. 567 (1947); *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56 (1956); *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala. 1959), *aff'd sub nom. State Corp. Comm'n* v. *Arrow Transportation Co.*, 361 U.S. 353 (1960). *See also* P. Mapes, *Competition Between Railroads and Water Carriers: A Comparison of the Regulatory and Antitrust Approaches and a Proposal for Reform*, 39 U. Pitt. L. Rev. 653, 764-77 (1978).

does or may compete for traffic, subject only to a narrowly defined exception. The Act is manifestly concerned with the structural objective of precluding common ownership. Unlike many trade regulation statutes, it does not purport to regulate specific anticompetitive practices; rather it is designed to prohibit the condition, *i.e.*, common ownership, in which such practices might thrive, and thereby to assure the benefits of competition between rail and water carriers.

The exception to the general prohibition of common ownership requires, *inter alia*, that the ICC find that the acquisition "will still allow competition, *without reduction*, on the water route in question." (Emphasis added). The Court of Appeals prefaced its construction of this provision by noting that "[b]arges, not trains, operate on water routes." (App. A, 13a). While descriptively accurate, this simplistic observation does not contribute to analysis of the question at hand. It disregards the fact that the Act is triggered by a finding of rail-barge competition, and that Congress was concerned with preserving competition between rail and water carriers for traffic moving along parallel routes. *See* H.R. Rep. No. 423, 62d Cong., 2d Sess. 12 (1912). It is illogical to conclude that Congress, motivated by a desire to preserve rail-water competition, and using the existence of such competition to trigger the statute, intended the ICC to then ignore such competition in deciding to approve or disapprove an acquisition between competing rail and water carriers.

The Act had its genesis in Congress' recognition that rail-barge competition had been destroyed as a result of common ownership. The opening of the Panama Canal presented the need for prompt legislative action. But Congress' concern was not limited to the Canal, and the Act was intentionally drafted to encompass coastwise and inland waterway traffic. *See* H.R.

No. 423, 62d Cong., 2d Sess. 12 (1912). The legislation did not occur in a vacuum. A pattern of railroads eliminating competition through acquisitions of water carriers had developed which Congress sought both to prohibit and to remedy. *See American Waterways Operators, Inc.* v. *United States*, 386 F.Supp. 799, 803 (D.D.C. 1974), *aff'd sub nom. Water Transport Ass'n* v. *United States*, 421 U.S. 1006 (1975).[11]

The Court of Appeals sought to buttress its ruling that the ICC could ignore rail-barge competition by holding, contrary to all prior understanding of the Act, that the Act was directed solely at the evil of predatory pricing by railroad-owned barge lines (App. A, 7a, 10a, 13a). This interpretation of the statutory purpose is manifestly incorrect; yet it is critical to the Court's decision because the majority in the Sixth Circuit conceded that if it had misconceived the purpose of the Act, it would be difficult to approve an acquisition of the magnitude of the one at bar (App. A, 6a-7a).

To be sure, Congress was aware of, and sought to prevent, several specific anticompetitive practices in which railroads had engaged, one of which was predatory pricing. Congress was aware of other anticompetitive practices as well: refusing

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[11] The House Report to the Panama Canal bill referred to the history of railroad abuse:

> The apprehension of railroad-owned vessels driving competition from the canal may or may not be exaggerated, but it is certain that the evil, which is only anticipated there, already exists in the coastwise trade on both coasts, as well as on our lakes and rivers. The evil is prevalent, recognized, and complained of. The proper function of a railroad corporation is to operate trains on its tracks, not to occupy the waters with ships in mock competition with itself, which in reality operate to the extinction of all genuine competition. In answering demands for the exclusion of railroad-owned ships from the canal . . . the committee thinks it wise, just, and opportune to broaden the amendment so as to serve the higher, wider, more pressing, and more necessary purposes of excluding the railroads from operating vessels in competition with their tracks anywhere in the coastwise trade generally or in the lake [sic] and rivers.

H.R. Rep. No. 423, 62d Cong., 2d Sess. 12 (1912).

to grant independent water carriers access to railroad controlled docks or allowing access only upon payment of unreasonable fees; providing poor quality service when a shipper used an independent water carrier; steering traffic to the railroad controlled water carrier and away from independent water carriers; and entering into exclusive contracts with shippers to use only the railroad controlled water carrier. *See* 48 Cong. Rec. 6594-95, 6642, 6690, 6760-61, 6929, 10372-73, 10464-66, 10556-57, 10562, 10567 (1912); American Academy of Political and Social Science, *Government Regulation of Water Transportation*—The Annals Volume LV at App. II, 253-55 (E. Johnson, ed. 1914). The legislative history reflects the fact that railroads, using these various anticompetitive practices (not just predatory pricing) had driven water carriers off the waters across the country.

These practices, however, were manifestations of—and were made possible by—the underlying evil of common ownership. Congress' overriding purpose was to promote the independence of water transport competition in order to insure the benefits of rail-water competition to shippers and the public ultimately served. Arguments that common ownership was more efficient and thus should be permitted subject to ICC regulation (*e.g.*, 48 Cong. Rec. 9234, 10463, 10561-62 (1912)) were rejected because Congress determined that competition from independent water carriers would effectively constrain rail rates. For example, ICC Chairman Prouty, urging adoption of the Act, stated: "While the Interstate Commerce Commission might, if vested with authority, prevent to some extent the injurious effect of allowing a common ownership over these competing carriers, still the limitations under which we act are such that we do not believe we could secure the same favorable rates which would result from unrestrained competition." 48 Cong. Rec. 10463 (1912); *see also* 48 Cong. Rec. 9238 (1912) (Sen. Townsend: "Water transportation, if kept free . . . will reduce rail rates and keep them reasonable . . .").

The courts that have interpreted the Act have uniformly recognized the broad purpose underlying its enactment. The only other Court of Appeals to consider the congressional purpose was the District of Columbia Circuit in its decision approving the voting trust used by CSX to hold ACL stock pending ICC review under the Act. *Water Transport Association* v. *ICC*, 715 F.2d 581 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984). The Court expressly held the Act was designed "to preserve rail-water competition by barring railroads from owning or controlling competing water carriers." *Id.* at 587. Other courts have similarly interpreted the congressional purpose, *American Waterways Operators, Inc.* v. *United States*, 386 F. Supp. 799, 803 (D.D.C. 1974), *aff'd sub. nom. Water Transport Ass'n* v. *United States*, 421 U.S. 1006 (1975), and have recognized the narrow scope of the Act's exception, *Lehigh Valley R. Co.* v. *United States*, 234 F. 682, 698-99 (E.D. Pa. 1916), *aff'd*, 243 U.S. 412 (1917). No court prior to the Sixth Circuit's decision in this case had held or even suggested that the sole purpose of the Act was merely to preclude predatory pricing or that the effect of the acquisition on rail-barge competition could be ignored in considering whether there had been a reduction in competition.

The Act is a specialized antitrust statute designed to preserve rail-barge competition by implementing the structural objective of generally prohibiting common ownership. Its focus on structure mirrors Section 7 of the Clayton Act, 15 U.S.C. § 18, passed in 1914, which governs mergers and acquisitions in the general economy. The Act, however, is more stringent than its Clayton Act analogue—the Act prohibits a rail-barge acquisition unless the railroad can establish that the acquisition will still allow competition "without reduction," while Section 7 of the Clayton Act prohibits only those acquisitions whose effect may be "substantially to lessen competition, or tend to create a monopoly."

Approval of the acquisition under the Act immunizes the transaction from antitrust scrutiny (App. A, 39a). Thus, the Sixth Circuit's decision upholding the ICC's sanction of the acquisition, and particularly its ruling that the ICC need not analyze rail-barge competition, means that the acquisition will never be subjected to an analysis of competition factors. The result is to create a gap in antitrust enforcement, contrary to Congress' unambiguous mandate.

B. The Court Of Appeals' Decision Is Contrary To The Established Interpretation And Application Of The Act

From the very beginning, the ICC has consistently held that the essential purpose of the Act is to promote unrestricted competition between railroads and water carriers serving a particular water route by ensuring that the water carriers existed under separate ownership free from railroad domination and control. *Lake Line Applications Under Panama Canal Act*, 33 I.C.C. 699, 706, 710, 712-13 (1915) ("Congress has decreed that there shall be a restoration of conditions which prevailed when railroads had no interest in and exercised no control over the boat lines plying the country's water routes."), *aff'd sub nom. Lehigh Valley R. Co.* v. *United States*, 234 F. 682 (E.D. Pa. 1916), *aff'd*, 243 U.S. 412 (1917); *Nicholson Universal Steamship Co.*, 248 I.C.C. 43, 67 (1941) (the congressional purpose behind the Act is "to enforce a complete separation between railroads and competing water carriers"). The ICC's own precedents belie that the Act was directed solely at the evil of predatory pricing. *Missouri Pacific Railroad*, 245 I.C.C. 143, 148 (1941) (Act "directed primarily to interests by railroad companies in competing water lines, which was the evil to be brought under control. . . ."). Indeed, the ICC stated as recently as 1983, in an earlier decision involving this very acquisition, that the fundamental purpose behind the Act was to preserve rail-water competition:

> The debates . . . in the House and Senate also clearly demonstrate that Congress had in mind relationships potentially adversely affecting rail-water competition . . . . In sum, the test of whether an interest is prohibited . . . is whether the relationship enables the railroad to adversely affect competition from water carriers . . . .

Water Transport Association - Petition for Declaratory Order - American Commercial Lines Voting Trust, 367 I.C.C. 559, 565-66 (1983), *aff'd sub nom. Water Transport Association* v. *ICC*, 715 F.2d 581 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984).

Consistent with its recognition of the broad legislative purpose to preserve rail-water competition, the ICC has, until now, given the exception contained in the Act a properly narrow construction:

> For any case to be within the spirit of this proviso it is necessary to show a situation in which are present all the elements which prevail, or would prevail, were the water service independently operated. On a watercourse where the boats and boat lines are free from domination or control by the railroads, and where they are left to survive as their merit or the ingenuity of their owners makes possible, there will be, and always is, a healthy rivalry and striving between such boat lines themselves and with paralleling railroads for all suitable and available traffic. There is competition.

Lake Line, supra, 33 I.C.C. at 712. In *Lake Line*, the ICC required divestiture by the railroads of the captive water carriers because it found that under separate ownership the water carrier would "become a competitor of every other boat line and of every paralleling railroad for all traffic which moves . . . or

which might move over that route. . . ," *id.* at 715, a situation which could not exist under common ownership.[12]

The ICC reaffirmed its strict interpretation of the Act in *Illinois Central Railroad Co. — Control — John I. Hay Co.*, 317 I.C.C. 39 (1962). In that case, the ICC refused to approve the acquisition of a water carrier by two railroads because it found that competition would be reduced between the acquiring railroads and the water carrier, whose operations were substantially competitive to and parallel with the lines of the railroads (317 I.C.C. at 52):

> The question is whether the transaction would *eliminate, diminish, forestall, hinder, or frustrate competition on the route by water in any manner and to any material degree; as, for example: between Hay and the controlling rail carriers;* between Hay and the competing water carriers; or between the competitive water carriers. To decide this question in applicants' favor it would be necessary to conclude that Hay's competitive status under the control of the railroads would compare favorably with its present status as an independently operated water carrier. . . . However, such a finding cannot be made on this record and would be improbable in any event in view of the directly competitive nature of the water carrier operations of Hay and the rail operations of the rail-

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[12] The ICC, implementing the congressional mandate, see note 6 *supra*, specifically rejected arguments (1) that projected efficiencies and lower costs from joint ownership provided a basis for approving the continued ownership, and (2) that ICC oversight was a sufficient check to anticompetitive conduct normally resulting from joint ownership. *Id.* at 711, 714-15. In the case at bar, the ICC embraced these very arguments, and thus rejected the views of ICC members involved with the drafting and passage of the Act. *See American Waterways Operators, Inc.* v. *United States*, *supra*, 386 F. Supp. at 804 & n.14 (views of ICC administrators who participated in drafting of Panama Canal Act entitled to "higher significance" than current administration views.)

> road applicants. . . . The transaction would reduce competition between Hay and the railroads.

317 I.C.C. at 54 (emphasis added).[13]

The ICC in the present case expressly overruled its decision in *Hay* to the extent *Hay* required a finding that the water carrier's competitive status in relation to the acquiring railroad after acquisition would compare favorably with its competitive status as an independent carrier (App. E, 80a-81a). If the only import of the overruling of *Hay* were the rejection of a doctrine of automatic bar of acquisitions between competing carriers no matter how minimal the competition between them, it would be unremarkable. But it cannot justify refusing even to analyze the impact of the acquisition on rail-barge competition.

Congress intended to prohibit acquisitions between rail and barge lines unless they will not reduce competition to any material degree. The ICC has no authority to nullify that mandate. But that is what the ICC has done. Its decision does not at any point analyze the impact of the acquisition on competition between CSX and ACL, and the Sixth Circuit has held that it need not do so.

Plainly, under the ICC's prior and correct interpretation of the Act, the acquisition of ACL by CSX would have been disapproved. In order to approve that acquisition, the ICC would have been required to find that the rail-barge competition between CSX and ACL would not be diminished "to any material degree," a finding which even the Sixth Circuit majority agreed would be arbitrary and capricious (App. A, 5a n.2).[14]

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[13] In addition to finding there would be a reduction of competition between Hay and the acquiring railroads, the ICC also found that the alliance of Hay with two strong railroads would give Hay a "substantial" competitive advantage over independent water carriers that would ultimately reduce competition. *Id.* at 54-55.

[14] In the voting trust decision by the District of Columbia Circuit, Judge Greene in his dissenting opinion stated that CSX's acquisition of ACL must ultimately be disapproved by the ICC on the merits when examined under the Panama Canal Act, "unless the ICC should at that time again apply its own policy rather than the congressional view of the proper relationships in the rail-water market." *Water Transport Association* v. *ICC*, *supra*, 715 F.2d at 601 & n.25.

C. Congressional Action Concerning The Act Confirms The Error Of The Court Of Appeals

Congressional action since the passage of the Panama Canal Act has underscored its continued commitment to the preservation of vigorous competition between independent water carriers and the railroads. Since the inception of the Act railroads and the ICC itself have repeatedly sought to alter or even repeal the Act and on every occasion Congress has declined to do so. In 1939 and 1959 railroad efforts to repeal the Act were unsuccessful. H.R. 4862, 76th Cong., 1st Sess. (1939); S. 1355, 86th Cong., 1st Sess. (1959). And, as recently as 1978, the ICC's recommendation that the Act be repealed was not accepted by Congress. *See* 48 Fed. Reg. 59,608-09 (1978).[15]

In 1940, Congress reenacted the Panama Canal Act as part of the Transportation Act of 1940. No substantive changes were made in the statute. *Hay*, 317 I.C.C. at 51; *Missouri Pacific Railroad*, 245 I.C.C. 143, 147-48 (1941); 86 Cong. Rec. 11270, 11766 (1940). It is well settled that "[w]hen the statute giving rise to the longstanding interpretation has been re-enacted without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' " *Federal Deposit Insurance Corp.* v. *Philadelphia Gear Corp.*, 54 U.S.L.W. 4525, 4528 (U.S. May 27, 1986), *quoting NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974). One court has specifically held that the effect of the

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[15] Efforts to weaken the Act began shortly after its passage and have continued. In 1916 the ICC requested that the Act be amended to permit acquisitions that might be deemed in the public interest. *See* 1916 ICC Ann. Rep. pp. 63, 65. Congress, however, took no action. In 1928 Congress reaffirmed its concern with independent competition between transportation modes by prohibiting the sale of the government owned and operated barge line to any rail carrier. Denison Act, Pub. L. No. 70-601, § 2, 47 Stat. 978, 979 (1928). In 1983, a bill to adopt a "public interest" standard in lieu of the prohibition and narrow exception failed to gain congressional support. S. 48, 98th Cong., 1st Sess. (1983).

reenactment of the Panama Canal Act in 1940 without pertinent change was to approve the ICC's longstanding interpretations of the Act and to give them the "effect of law." *American Waterways Operators, Inc.* v. *United States, supra*, 386 F. Supp. at 804 n.17. The confirmatory effect of this reenactment is especially great because Congress expressly referred to and approved the ICC's decision in *Lake Line* in the course of the 1940 reenactment. 86 Cong. Rec. 11766-67 (1940). *See Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 54 U.S.L.W. 4520, 4523 (U.S. May 27, 1986) (where legislative history of statute's reenactment reveals "clear congressional awareness" of existing interpretation, the fact Congress left the interpretation "undisturbed lends powerful support to [its] continued viability").

Finally, in 1980, when Congress passed the Staggers Rail Act deregulating the railroads, it recognized and reaffirmed the importance of preserving competition between rail and water carriers. *See* Pub. L. No. 96-448, §§ 101(a)(4), (5), 707, 94 Stat. 1897, 1965-66 (1980); S. Rep. No. 470, 96th Cong., 1st Sess. 30 (1979); H.R. Rep. No. 1035, 96th Cong., 2d Sess. 39 (1980); H. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 142-43 (1980). Moreover, in passing the Staggers Act, Congress expressly acknowledged the critical function of the Panama Canal Act: "[I]t prohibited railroads from owning water carriers in competition with rail routes. The Act successfully headed off transportation companies." H.R. Rep. No. 1035, 96th Cong., 2d Sess. 82 (1980). Congress obviously expected that water carriers would serve as an important check on the deregulated railroads and that the independence of those water carriers would be ensured by the Panama Canal Act. Indeed, the ICC itself has repeatedly recognized and relied on the constraint which water rates exert on rail rates to justify rail mergers and rate decisions, including the ICC's decision approving the railroad merger forming CSX. *CSX Corp.*, 363 I.C.C. 518, 569, 573 (1980); 49 C.F.R.

§ 1180.1(c)(2)(i) (1985); *Investigation of Railroad Freight Rate Structure—Grain and Grain Products*, 345 I.C.C. 2977, 3010, 3020 (1979). The ICC's decision in this case will have the inevitable effect of removing one of the cornerstones of deregulation and permitting formation of the very transportation companies Congress intended to prohibit.

D. The Court Of Appeals Disregarded The Competitive Realities And Ignored The Practical Implications Of Its Decision

The Court of Appeals simply disregarded the competitive realities in this case and was blind to the practical implications of its decision. Under the Act, approval of an acquisition is an exception to a general prohibition, but the Court of Appeals has transformed the exception into an open door. If the acquisition of the nation's largest barge line by the nation's second largest railroad, with which it can and does compete, can be approved, no acquisition will be denied, and the Sixth Circuit has essentially conceded that this is so (App. A, 10a). Common sense dictates that Congress did not intend this result, and analysis of the statute and legislative history demonstrates that it certainly did not. Unless this decision is reversed the Act will have been effectively repealed.[16]

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[16] Of the four Commissioners voting on the CSX/ACL transaction, two acknowledged their approval would effectively nullify the Act:

> *Chairman Taylor:* "This is about as tough a case as we could have, . . . the biggest eastern coal carrier in the rail business, [and] either [the] first or second [largest] . . . barge line, and the fact of the matter is that if we grant this one, I don't know how you deny any others. . . ." Open Conf. Tr. 59.
>
> *Commissioner Sterrett:* "If we grant this application, how do we breathe any vitality into the Panama Canal Act at all? . . . [R]eally, as of 11:20 this morning, any other applicant here would have to be granted as well, presumably." Open Conf. Tr. 58-59.

Commissioner Andre approved the acquisition because there was a "willing buyer and a willing seller" and the "urge to merge." Open Conf. Tr. 73.

II. The Court Of Appeals Erred In Ruling That Competition Would Not Be Reduced Unless Water Carriers Were Driven Completely Out Of Business.

Even assuming the Court of Appeals is correct in holding that the Act's exception is concerned only with barge-barge competition, the Court has fundamentally misconstrued the standard for assessing the impact of an acquisition on that competition. The Court of Appeals held that a railroad acquisition of a competing water carrier does not reduce competition within the meaning of the Act so long as its effect is not "to drive other bargelines completely out of the market." (App. A, 14a). The Court has adopted, in effect, a standard keyed to a destruction of the independent barge competitors of ACL. Such a standard is patently inconsistent with the language of the Act and is erroneous as a matter of law.

In order to approve an acquisition under the Act, the ICC must find that it "will still allow competition, *without reduction*, on the water route in question." (Emphasis added). As the ICC itself has conceded, the standard is a stringent one. *Any* lessening of competition invalidates the acquisition (App. E, 77a). The Court of Appeals has effectively substituted the word "destruction" for "reduction" in the language of the Act's exception. This interpretation of the Act simply cannot be sustained on any basis.

CONCLUSION

The case presents important questions concerning the Act which should be settled by this Court. If the Sixth Circuit's decision is allowed to stand, the Act will have been effectively repealed by the ICC, acting in direct contravention of Congress' intent to preserve rail-barge competition. Unless this Court intervenes, the nature of this country's surface transportation industry will be fundamentally and irrevocably altered. The petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD A. ZELLNER
MARK E. STAIB
SMITH R. BRITTINGHAM, III
HAHN LOESER & PARKS
800 National City E. 6th Bldg.
Cleveland, Ohio 44114

A. DUNCAN WHITAKER, P.C.
ALAN M. WISEMAN
ROBERT M. BRUSKIN
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JAMES F. BROMLEY
BROMLEY, BROWN & WALSH
1625 Eye St., N.W.
Washington, D.C. 20006

WILLIAM L. PATTON
Counsel of Record
THOMAS H. HANNIGAN, JR.
ROPES & GRAY
225 Franklin Street
Boston, MA 02110
(617) 423-6100

WILLIAM E. HYNAN
PETER A. GABAUER
1130 17th St., N.W.
Washington, D.C. 20036

NICHOLAS J. SPAETH
LYNN L. SCHLOESSER
MARY ANN JOHNSON
State Capital
Bismark, N. Dakota 58505

Counsel for Petitioners

June 26, 1986

CSX AND ACBL SYSTEMS SERVING MAJOR PORTS

WATERBORNE COMMERCE 1981

100 MILLION SHORT TONS
50
25
10
5
1

ACBL
CSX

0 50 100 150 200 250
MILES

Chicago 50
Cincinnati 15.1
Huntington 18.6
Pittsburgh 32.3
St. Louis 22.7
Evansville
Louisville 7.8
Nashville 2
Knoxville .3
Chattanooga 2.5
Memphis 11.4
Mobile 37.6
Pascagoula 26.4
Biloxi 1.2
Gulfport 1.1
New Orleans 188.9
Tampa 45

MINNESOTA
SOUTH DAKOTA
WISCONSIN
MICHIGAN
NEW YORK
VT.
IOWA
NEBRASKA
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INDIANA
OHIO
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Richmond
Newport News
Norfolk
Portsmouth
Winston-Salem
Greensboro
Raleigh
Charlotte
Columbia
Savannah
Jacksonville
Ohio River
Kanawha R.
Monongahela River
Kentucky R.
Green R.
Cumberland R.
Tennessee River
Arkansas River
White R.
Mississippi River
Yazoo River
Tombigbee R.
Alabama R.
Black Warrior
Chattahoochee R.
Ouachita R.
Red R.
Illinois River
Missouri
Lake Erie
Lake Michigan
Lake Ontario

85-2133
No. -

Supreme Court, U.S.
FILED
JUN 25 1986
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In the Supreme Court of the United States

OCTOBER TERM, 1985

CROUNSE CORPORATION, ET AL.,
PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.
RESPONDENTS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RICHARD A. ZELLNER
MARK E. STAIB
SMITH R. BRITTINGHAM, III
HAHN LOESER & PARKS
800 National City E. 6th Bldg.
Cleveland, Ohio 44114

A. DUNCAN WHITAKER, P.C.
ALAN M. WISEMAN
ROBERT M. BRUSKIN
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JAMES F. BROMLEY
BROMLEY, BROWN & WALSH
1625 Eye St., N.W.
Washington, D.C. 20006

WILLIAM L. PATTON
Counsel of Record
THOMAS H. HANNIGAN, JR.
ROPES & GRAY
225 Franklin Street
Boston, MA 02110
(617) 423-6100

WILLIAM E. HYNAN
PETER A. GABAUER
1130 17th St., N.W.
Washington, D.C. 20036

NICHOLAS J. SPAETH
LYNN L. SCHLOESSER
MARY ANN JOHNSON
State Capital
Bismark, N. Dakota 58505

Counsel for Petitioners

Blanchard Press, Inc., Boston, Mass. — Law Printers [617] 426-6690

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 84-3743 through 84-3753,
84-3842, 84-3868

CROUNSE CORPORATION, ET AL.,
PETITIONERS,

v.

INTERSTATE COMMERCE COMMISSION
AND UNITED STATES OF AMERICA,
RESPONDENTS.

On Petition for Review of a Decision of the
Interstate Commerce Commission

Decided and Filed January 23, 1986

Before: Kennedy and Krupansky, Circuit Judges; and Timbers,* Senior Circuit Judge.

Kennedy, Circuit Judge, delivered the opinion of the Court in which Krupansky, Circuit Judge, joined. Timbers, Senior Circuit Judge (pp. 33-42) delivered a separate dissenting opinion.

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* The Honorable William H. Timbers, Senior Circuit Judge, United States Court of Appeals for the Second Circuit, sitting by designation.

KENNEDY, Circuit Judge. In this appeal, petitioners[1] contest the August 27, 1984 decision of the Interstate Commerce Commission (Commission or ICC) approving the acquisition by CSX Corporation, the nation's second largest railroad, of American Commercial Lines, Inc. (ACL), which owns the nation's largest bargeline, American Commercial Barge Lines (ACBL). Petitioners and intervenors claim that the ICC erred in holding that the transaction violates neither the Panama Canal Act, 49 U.S.C. § 11321, nor section 11344 of the Interstate Commerce Act, 49 U.S.C. § 11344. We find that neither statute prohibits the transaction and, therefore, we uphold the ICC's interpretation and application of the statutes. We also find that the ICC took the requisite "hard look" at the potential consequences of the merger in its Environmental Assessment of the proposed transaction. We therefore affirm the Commission's order.

Liquid chemicals, farm products and coal are the three principal commodities served by railroads and bargelines. Over its 27,000 route miles, CSX—the largest railroad east of the Mississippi River—transports 47.9% of chemicals, 31.6% of farm products and 48.3% of the coal moved by all Class I railroads in the East. ACBL, the nation's largest bargeline, covers 7,500 water route miles and is the only for-hire water carrier which is among the top three for-hire bargelines in each of the three principal commodity markets. In some areas, CSX and ACBL routes parallel each other to a significant degree.

On November 4, 1983, CSX and ACL jointly filed with the ICC an application for CSX to acquire control of ACL and ACBL. In support of the application, the companies asserted that the transaction would achieve substantial public benefits in the form of reduced costs, innovative joint marketing and ratemaking opportunities and other benefits of integrated operations. The companies claim they would be able to offer

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[1] Petitioners are eleven water transport companies, the Tennessee Valley Authority, and the Illinois Legislative Director for the United Transportation Union. They are joined by numerous intervenors.

shippers more efficient, better coordinated, intermodal services, which would expand shippers' marketing options. In this way, the consolidation would allegedly make CSX and ACL more competitive, thereby enhancing the overall competitiveness of the market.

Various parties participated in the public hearings held before an Administrative Law Judge between February 22 and May 11, 1984. Numerous shippers, states, utilities, water carriers and labor organizations opposed the application on various grounds. Some shippers and states supported the application. The ALJ made no findings of fact, nor did he prepare a recommended decision. He simply oversaw the hearings. With the benefit of the record generated by the hearings, the ICC heard oral argument on June 21, 1984. On August 27, 1984, in a lengthy written decision, the ICC approved the acquisition subject to certain oversight and reporting conditions which the ICC imposed as a precaution, to enable it to take corrective action against unforeseen anticompetitive effects.

Essentially, petitioners object to the Commission's decision on the ground that it eviscerates the Panama Canal Act, 49 U.S.C. § 11321, which prohibits railroad ownership of bargelines except under certain specified conditions. Petitioners do, however, suggest various other grounds for reversal: that the Commission arbitrarily and capriciously concluded that the merger would not result in any reduction of competition prohibited by the Interstate Commerce Act, 49 U.S.C. § 11344; that the Commission denied the public a full and fair hearing by deciding the case without the benefit of an initial ALJ decision; that the Commission has no authority to impose oversight conditions in a Panama Canal Act case; that the Commission failed to impose protective conditions for the benefit of employees or other railroads; and that the Commission failed to assess the potential environmental effects as thoroughly as is required by the National Environmental Policy Act of 1969, 42 U.S.C. § 4321. We address each of these issues in turn.

Yielding to public concern over the anticompetitive effects of some rail-barge consolidations, Congress passed the Panama Canal Act (the Act) in 1912. The Act generally proscribes railroad ownership of or interest in a water carrier on a water route with which the railroad does or may compete for traffic. The proscription, however, is not absolute. The Commission may authorize the acquisition of such an interest

> when the Commission finds that ownership, operation, control, or interest will still allow that water common carrier or vessel to be operated in the public interest advantageously to interstate commerce and that it will still allow competition, without reduction, on the water route in question.

49 U.S.C. § 11321(b).

Only a finding of competition between the acquiring railroad and the acquired bargeline triggers the statutory prohibition and necessitates inquiry into the applicability of the exception. 49 U.S.C. § 11321(a). If the Commission finds no such competition, the Act does not preclude the merger. *See generally American Waterways Operators, Inc.* v. *United States*, 386 F.Supp. 799 (D.D.C. 1974).

Upon examination, the Commission determined that CSX and ACL do compete, within the meaning of the Act. The Commission then analyzed the merger in terms of the above exception's two prongs—the public interest prong and the competition prong. Viewing the two prongs as closely related, the Commission found that the public interest prong was satisfied by a showing that the CSX-ACL combination would not be able to flout the public interest by engaging in anticompetitive behavior ultimately allowing it to charge supracompetitive prices. In the Commission's view, a finding that that particular harm would not ensue sufficiently ensured the continued operation in the public interest contemplated by the statute. Nonetheless, the Commission also pointed out that anticipated improvements in operating efficiency and quality of service also indicated that the water carrier would continue to be operated in the public interest.

Leaving the public interest prong and turning to competition, the Commission analyzed the competitive nature of the barge industry and concluded that the merger would not be harmful to competition on the waterways. The Commission conceded that the merger could harm individual competitors but, rejecting its own precedent in *Illinois Central Railroad Co. —Control—John I. Hay Co.*, 317 I.C.C. 39 (1962), ruled that harm to competitors is not harm to competition within the meaning of the statute. The commission also rejected *Hay's* holding that the exception required not only a finding that competition would not be reduced among water carriers, but also a finding that competition would not be reduced between water carriers and railroads, including competition between the acquired carrier and the acquiring railroad. The Commission therefore looked only at the effect the merger would have on competition among water carriers, and ignored the effect on rail-barge competition.[2] The Commission found that the competitive structure of the barge market is such that the merger does not threaten to harm competition between water carriers.

In petitioners' view, the Commission has misinterpreted the Act. According to petitioners, the Act reflects Congress' desire to implement a policy of strict rail-barge separation, subject to only the narrowest exceptions. Petitioners argue that nothing could be further from the narrow exception contemplated by Congress than this merger of giants in their respective modes of

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[2] The Commission also suggested that a finding of no harm to competition could be made if competition between CSX and ACL was so minimal that the merger could not have a substantial anticompetitive impact. Petitioners argue strenuously that finding competition between CSX and ACL to be minimal is arbitrary and capricious. We would agree that such a finding might very well be arbitrary and capricious, but our reading of the ICC decision indicates that, if such a finding was in fact made (the Commission did refer to CSX-ACL competition as "modest"), it did not form the basis for the Commission's conclusions about harm to competition. Rather, the Commission's analysis of the competition prong relies on its view that only barge competition and not rail-barge competition, is relevant under the statute.

transportation. Petitioners also argue that the exception provided for in the Act requires consideration of the effect on rail-barge competition, not just barge-barge competition.

Zealously as petitioners contest the Commission's interpretation of the Act, they nevertheless also argue that even if that interpretation is correct, the Commission has *misapplied* the Act. Petitioners submit that the Commission's application of the Act is flawed because it is based upon factual determinations regarding the barge industry which petitioners contend are arbitrary and capricious. Specifically, petitioners object to the Commission's findings that the barge industry is highly competitive and relatively unconcentrated, and that barriers to entry in the industry are not high.

Although substantially intertwined, our review of the Commission's interpretation of the statute naturally differs somewhat from our review of the Commission's application of the statute. While an agency's interpretation of a statute is entitled to deference, "federal courts bear the ultimate responsibility for interpreting federal statutes." *Meade Township* v. *Andrus*, 695 F.2d 1006 (6th Cir. 1982). Our task, however, is not to determine whether we think the Commission's construction is the best construction, but only to determine whether the Commission's construction was "sufficiently reasonable." *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 75 (1975). "To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981).

The characterization of the Panama Canal Act as a strict prohibition against railroad ownership of bargelines runs through all of petitioners' arguments, and petitioners would have us consider all of their arguments against the imposing background of this characterization. Such characterization, if accu-

rate, would make it difficult to interpret a narrow statutory exception to encompass a merger between companies the size of CSX and ACL. Our reading of the statute, the legislative history of its initial passage in 1912, and the legislative history of its reenactment in 1940, convinces us, however, that Congress did not intend to mandate absolute rail-barge separation, but, rather, meant to remedy a particular evil which frequently accompanied railroad acquisition of bargelines.

The "evil" which spurred Congress to action in 1912 was the distasteful propensity of railroads to buy up a bargeline with which they actively competed, lower barge rates on that line sufficiently to drive other barge competitors out of business, then close the acquired bargeline or raise its rates to the level of rail rates, leaving shippers no genuine alternative to rail transport. The large financial resources of the railroads allowed them to weather the short-term loss associated with the reduced barge rates, while forcing the smaller, independent barge companies from the water.

The legislative history is replete with references to this practice. For example, Senator Chamberline remarked:

> The people of Portland, Oregon, are practically at the mercy of the same Southern Pacific Co. That company operates a line of railroad from Portland, Oreg., to San Francisco, and at the same time they operate the only line of steam ships between Portland and San Francisco. What is the effect? If they charge a rate which is unfair or too high, an independent line of steamers is out on the river and ocean route. Immediately the railroad-controlled steamers and the railroad itself reduce the rate to a figure which will not afford a reasonable or any compensation to the independent line of steamers. These must then operate at a loss. Then what happens? The independent line of necessity withdraws from competition to avoid bankruptcy, and immediately the railroad company and the railroad-controlled line of steamships raise the rate to more

> than a remunerative basis. Experience has proven that railroad-controlled steamers can afford to create large deficiencies, which are paid by the railroad company in order to enable the latter to maintain a higher level of rates.

48 Cong. Rec. 10,373 (1912).

Petitioners contend that Congress' solution to that problem was a strict prohibition against railroad ownership of bargelines. Doubtless some, perhaps many, of the legislators who supported the Act favored strict rail-barge separation. *See, e.g.*, 48 Cong. Rec. 9238 (1912) ("So far as our internal affairs are concerned it would be well to confine our common carriers strictly and exclusively to transportation—the railroads on the land, the boats on the water.") (Remarks of Senator Townsend). Other supporters of the Act favored the least restrictive legislation necessary to combat the "evil." Not surprisingly, the legislative history does not conclusively reveal which attitude prevailed. We therefore think it appropriate to heed the oft-cited "canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood* v. *United States*, 350 U.S. 366, 374 (1956).

The Act does not absolutely proscribe railroad ownership of bargelines. Rather, in recognition that the railroads' motives in such acquisitions were frequently anticompetitive, the Act promulgates the general rule that railroads shall not own bargelines. The Act includes the exception, however, and that exception must be read in light of the evil with which the Act concerns itself. The Commission may allow railroad ownership of a bargeline if such ownership "will still allow that water common carrier or vessel to be operated in the public interest advantageously to interstate commerce," (as opposed to the water carrier eventually being shut down) and such ownership "will still allow competition, without reduction, on the water route in question" (as opposed to reducing competition on the water route by driving other water carriers out of business). The final

form of the Act, with its general prohibition and its exception, indicates to us that Congress intended only to end the specific anticompetitive practice which prompted it to act. Congress declined to go further and enact the strict prohibition which some called for and which petitioners now ask us to read into the Act.

This view of the Act finds support both in contemporaneous ICC decisions and in events surrounding the Act's reenactment in 1940. Among the very first ICC applications of the Act were *Lake Line Applications Under Panama Canal Act*, 33 I.C.C. 700 (1915), and *Ocean Steamship Company of Savannah*, 37 I.C.C. 422 (1915). In *Lake Line*, the Commission considered the applications of several railroads seeking permission for continued ownership of the bargelines which they had owned prior to passage of the Act. The Commission discussed the problem which the statute had addressed, *see* 33 I.C.C. at 712-13, and, rather than rely on a perceived strict mandate of rail-barge separation, made a searching inquiry into whether the exception should apply. Because the joint operations at issue in *Lake Line* had attempted "by an artificial rate structure to deprive the public of the natural benefits that would flow from a free use of this waterway" and had caused rates to be "steadily advanced," 33 I.C.C. at 713-14, the Commission found that the exception did not apply and denied the applications.

Only seven months later, in *Ocean Steamship*, the Commission applied the exception and granted a railroad permission to continue its ownership of a steamship line with which it competed within the meaning of the Act. The Commission concluded that:

> Upon all the facts of record we are of opinion and find that the present operation of the steamship company as a whole is in the interest of the public; that it is of advantage to the convenience and commerce of the people; and that its continued ownership and operation by the Central of Georgia, as at present conducted, will neither exclude,

> prevent, nor reduce competition on the routes by water under consideration, and that the application should be granted, subject to such further order or orders as may hereafter be entered by the Commission.

37 I.C.C. at 429. From the beginning, then, the exception has been given weight.

In 1940, Congress reenacted the Act. Vigorous debate arose, focusing on a change in wording intended to clarify that the exception could be applied not only to applications for *continuing* joint operation, but also to application for *new* joint operations. The ICC had held precisely this in *Southern Pacific Company's Ownership of Atlantic Steamship Lines*, 77 I.C.C. 124 (1923). Again, the debates reveal some sentiment for stricter rail-barge separation, *see* 86 Cong. Rec. 11537-11544 (1940), but that sentiment did not find its way into the statute as reenacted. As stated by the only other court to consider the question since the 1940 reenactment, "Congress clearly expected rail carriers to be able, with ICC approval, to acquire competing water carriers." *Water Transport Association* v. *I.C.C.*, 715 F.2d 581, 590 (D.C. Cir. 1983).

Petitioners argue that the ICC's reading of the Act renders the Act's prohibition meaningless. If the exception can be read so broadly as to apply to this merger, so the argument goes, it is inconceivable that any other merger could fail to fall within the exception; in effect, the Act no longer prohibits anything. This, say petitioners, amounts to administrative repeal of a statute. While this argument has some merit, it is flawed in that it is subtly wedded to the notion that Congress intended the Act to do more than just address the particular evil discussed above.

Assuming for the moment that it is true, as it may well be, that the Commission's interpretation of the statute would allow almost any rail-barge merger, the Commission is not necessarily guilty of repealing the Act. Rather, that a merger of this magnitude could, upon analysis, fall within the Act's exception suggests that the evil which the statute was carefully designed to

curtail in 1912 and 1940 is not likely to occur in the transportation industry of 1985. Nor does this amount to administrative or judicial redetermination of a legislatively determined fact. The Act's flexibility is deliberate. Congress did not determine that all rail-barge mergers worked the same evil. If it had, it would have enacted an absolute prohibition. Rather, Congress contemplated that some mergers might not pose a threat, and those mergers could be allowed. The notion that the day might come when the economics of the transportation industry would preclude many rail-barge mergers from posing a threat to competition is not contrary to any legislative determination. While the findings in the instant case strongly suggest that the Commission believes that day has come, we need not expressly determine that. The Act remains in full force, and the Commission, of course, will continue to analyze acquisitions under the Act on a case-by-case basis.

Petitioners challenge the Commission's interpretation of the Act in another respect. Petitioners contend that in determining whether the merger "will still allow competition, without reduction, on the water route in question," the Commission is required to consider the effect of the merger on rail-barge competition, rather than just the effect on barge-barge competition. Under petitioners' analysis, the elimination of the substantial (or "modest") competition between CSX and ACL constitutes a reduction in competition under the Act.

The Commission itself previously adhered to that interpretation. In *Illinois Central Railroad Co. - Control - John I. Hay Co.*, 317 I.C.C. 39 (1962), the Commission refused to allow an acquisition because it found that a reduction in competition would follow:

> The question is whether the transaction would eliminate, diminish, forestall, hinder, or frustrate competition on the route by water in any manner and to any material degree; as, for example: *between Hay and the controlling rail carriers*; between Hay and the competing water carriers; or

> between the competitive water carriers. To decide this question in applicants' favor it would be necessary to conclude that Hay's competitive status under the control of the railroads would compare favorably with its present status as an independently operated water carrier. However, such a finding cannot be made on this record and *would be improbable in any event in view of the directly competitive nature of the water carrier operations of Hay and the rail operations of the railroad applicants*. . . . The transaction would reduce competition between Hay and the railroads.

317 I.C.C. at 54 (emphasis added) (citations omitted). In its decision in the instant case, however, the Commission announced that it was changing course:

> Finally, in evaluating whether competition will be reduced, we note that preservation of competition in a particular transportation market is not synonymous with the preservation of the position of each competitor. . . . We must consider whether market forces would preserve the level of competition on the water route generally even though the competitive relationship between the railroad, the acquired water carrier, and other water carriers would be altered. Harm to competitors does not imply harm to competition. Consequently, the holding in *John I. Hay*, to the extent inconsistent with this decision, that a finding of no reduction of competition on the involved water route requires a supporting conclusion that the involved water carrier's competitive status in relation to other carriers (including the acquiring railroad) would compare favorably with its competitive status as an independent carrier, is rejected and will no longer be followed.

Commission Decision at 19.

Administrative agencies are not bound by their own prior construction of a statute. They are free to reject prior constructions which have not been endorsed by the courts. *See NLRB* v.

Local Union No. 103, International Association of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335, 351 (1978) ("An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes.") We therefore review the Commission's construction of the statute without regard to the shift it represents from the construction in *Hay*.

Petitioners point out that the Act's prohibition is only triggered by a finding that the acquiring railroad and the acquired bargeline compete. They would argue that it is not reasonable to focus on rail-barge competition in triggering the prohibition, and then to ignore rail-barge competition in construing the exception. We disagree. For one thing, the language of the Act reads, "will still allow competition, without reduction, *on the water route in question.*" Barges, not trains, operate on water routes. Further, the Commission's construction is faithful to the Act's purpose. To prevent the disreputable practice that prompted the Act, it was sensible to use rail-barge competition as a triggering mechanism. No railroad would be tempted to eliminate barge service against which the railroad did not compete for traffic.

Thus triggered, however, no apparent necessity exists for continuing to focus on rail-barge competition. Congress intended to prevent railroads from running their barge competitors ashore. A reduction in competition, even a significant one, between a railroad and a bargeline does not automatically portend a reduction in competition among the various bargelines. If the Commission concludes that no reduction in competition will occur among bargelines, it is irrelevant that some reduction in rail-barge competition may ensue. We therefore hold that it was reasonable for the Commission to construe the competition prong of the Act's exception as requiring only an analysis of the harm to competition between bargelines.

Even allowing that the Commission was correct to look only at competition between bargelines, petitioners argue that the Commission employed a "destruction of the industry" standard, rather than a mere reduction in competition standard. Petitioners contend that the Commission would not find any reduction in competition unless it determined that all bargelines would be put out of business. Again, petitioners misapprehend the objective of the Act. The Act was not intended to protect bargelines from the threat of having to compete with a rail-backed bargeline. Had that been the goal, Congress would have enacted a flat prohibition on railroad ownership of barges.

Rather, Congress intended the Act to protect the shipping public from the artificially high rates a railroad could charge after eliminating barge competition. *See Steamer Lines on the Chesapeake Bay*, 35 I.C.C. 692, 696 (1915) (legislative purpose to insure that "under railroad ownership the lines render service as good as they would render if independently owned and operated, and that railroad ownership does not deprive the public of substantial benefits of competition, either in service or in rates"); *Lake Line Applications under Panama Canal Act*, 33 I.C.C. 700, 712 (1915) (legislative purpose to insure that "[t]he rates charged fluctuate according to economic principles, and the shipper enjoys invariably, as a result, lower charges for the transportation routed over such waterways and thereby reaps a return from the 'nation's highway' "). In the instant case, the Commission construed the Act to require an actual reduction in competition as opposed to simply harm to particular bargelines due to intensified competition. As long as the Commission finds that competition will not be so intensified as to drive other bargelines completely out of the market, the interests of the shipping public are protected. We therefore hold that in this respect as well the Commission reasonably construed the Act.

We now turn from petitioners' objections regarding the Commission's interpretation of the Act to petitioners' objections regarding the Commission's application of the Act. The factual

determinations which an agency makes in the course of applying a statute, while subject to "searching and careful" review of the whole record, including "the body of evidence which opposes the [agency's] decision," *Union Carbide Corp.* v. *NLRB*, 714 F.2d 657 (6th Cir. 1983), can be rejected only if we find no substantial evidence supporting the conclusion or if we find the conclusion to be so out of touch with the reality revealed by the whole record as to be arbitrary and capricious. *See* 5 U.S.C. § 706(2).

Petitioners contend that the Commission erred in concluding that both prongs of the Act's exception were satisfied by the facts in the present case. Petitioners object to the Commission's treatment of the public interest prong, claiming that the Commission reduced it to mere surplusage by failing to make a specific finding that the merger is essential to the public good. The Act requires no such finding, however. The Commission must find that the acquisition "will still allow that water common carrier or vessel to be operated in the public interest advantageously to interstate commerce." This is merely a requirement that the public interest not be adversely affected. *Increased* benefits to the public are not required.

The Commission found that there would be no damage to the public interest, since ACL would continue to operate as an active competitor on the waterways, rather than be shut down by CSX. This finding sufficiently satisfies the public interest prong. Ample evidence supports the finding, and we cannot say that it is arbitrary or capricious.

We now come to the most vigorously debated aspect of the Commission's decision. In ruling that a CSX-ACL merger "will still allow competition, without reduction, on the water route in question," the Commission necessarily probed the current nature of the water transportation industry. The Commission was forced to determine facts with respect to various hotly contested questions. The voluminous record generated below contains evidence upon which the Commission might have based conclusions more favorable to petitioners. But other evidence supports the Commission's findings.

It is with respect to these questions, questions intimately entwined with the nature of the industry, that we owe the Commission the greatest deference.

> Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission "to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms." 79 Cong. Rec. 12207. . . . If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order.

McLean Trucking Co. v. *United States*, 321 U.S. 67, 87-88 (1943). *See also Cleveland Electric Illuminating Co.* v. *ICC*, 685 F.2d 170, 173 (6th Cir. 1982).

The first question is whether, in its competitive analysis of the barge industry, the Commission erred in its market definition. Applying the Department of Justice Guidelines it found the product to be water carrier transportation. It found that although rail transportation afforded some competition to water carriage, that competition was limited because barge rates and costs were so much lower than rail rates and costs and gave only limited consideration to competition from rail and other modes of transportation and only to the extent that they effectively disciplined barge rates on the routes in question. Thus the Commission, rather than distinguishing the three main commodity markets—liquid chemicals, farms products, and coal—initially lumped them all into a single market. Defining the market this way has obvious consequences. The barge industry as a whole appears far less concentrated than, for example, that segment of the barge industry devoted solely to coal transportation. The Commission's broad market definition reflected an industry in which the leader hauled slightly over

five percent of all barge traffic, and the top twelve companies hauled only twenty percent of all traffic. Petitioners point out if the barge transportation of coal is treated as a separate market, three bargelines haul fifty percent of all coal moving on the Ohio River System, which is where the vast majority of coal moves, and the top six bargelines account for seventy percent of that coal movement. Petitioners also object to including private barge fleets in the relevant markets.

The Commission found that barge equipment was sufficiently interchangeable to permit carriers to switch from one commodity to another and that therefore water carriers specializing in the transport of one commodity can and do switch to other commodities when to their advantage. It also found that the private carriers were competition in the market.

With respect to a geographic market, the Commission included the Mississippi River System and the Gulf International Waterway since equipment was generally interchangeable, and there was no physical barrier to movement throughout those systems. The selection of the relevant market seems to us to be the very type of "complex task which requires. . .expert judgment and considerable knowledge of the transportation industry" where the reviewing court should defer to the Commission.

Intervenors challenge the Commission's findings with respect to interchangeability of barge equipment. They argue that some barges are specialized; those for coal hauling, for example, sometimes have greater inner bottom steel thickness so they will not wear out as soon. The Commission found this to be a carrier's operational choice but not one that significantly affected the interchangeability. It reached a similar conclusion with respect to problems of covers interfering with the unloading of coal from barges. The evidence that many barges are used interchangeably even with these differences is substantial evidence to support the Commission's findings.

Intervenors also argue that the Commission's finding that there is ease of interchangeability of a coal barge to a grain barge by the addition of a cover is arbitrary since a cover for a typical $225,000 barge costs approximately $50,000, or almost twenty-two percent of the cost of the barge. The $50,000 cost is a substantial sum.

The significance of this sum, however, as an obstacle to transferring barges from coal hauling to grain hauling depends upon numerous factors, such as the profit margin, capital costs, long-term contracts, shipper backing of capital needs, etc. All of these matters are within the special competence of the Commission.

Further, even if we were to hold that the Commission's finding of interchangeability was arbitrary and capricious the remedy would be remand for analyses of separate commodity markets. Even though the Commission thought such analysis was unnecessary, the Commission did perform the analysis noting that "[b]ecause of the importance of coal and agricultural commodities in the traffic bases of the applicants, we will look at those movements separately and determine whether the transaction would have any adverse impacts on the transportation of those commodities." Commission Decision at 25.

The Commission analyzed competition for coal hauls and grain hauls in depth. *See* Commission Decision at 49-58. We see no need to repeat the Commission's analysis. The data employed all find support in the record. Petitioners' objection amounts to simple disagreement with the Commission on a matter of judgment. Petitioners contend that CSX will channel all of the coal shipments originating with it to ACBL and away from other bargelines. Petitioners fear that ultimately they would experience higher unit costs due to lower traffic density, driving them out of business and leaving CSX—ACL to practice monopoly pricing.

The Commission envisioned the ultimate consequences differently. Even looking at a worst-case scenario, where most CSX traffic would eventually be diverted to ACBL from other bargelines, the Commission still concluded that although this would mean diminished traffic for some of ACBL's competitors, those competitors could still continue to maintain viable operations. The Commission conceded that "any carriers which experience loss of CSX-originated traffic would have to adjust their fleet sizes and operating schedules to the traffic remaining." Commission Decision at 52. This, however, represents only harm to competitors, not harm to competition, and as the Commission concluded,

> we do not think that the assumed "worst case" traffic diversion would harm barge lines competing with ACBL beyond the loss of revenue attributable directly to CSX-originated traffic and associated backhauls. Since these carriers would remain viable competitors, ACBL would face no fewer competitive constraints in its pricing of coal movements after the consolidation than it faces today.

Commission Decision at 52-53.

Petitioners urge upon us that harm to competitors would, in this case, translate into harm to competition by creating an atmosphere in which competitors could not survive. But this is precisely the type of judgment call on which we must defer to the Commission's expertise in the transportation industry, so long as the judgment is a reasonable one. If competitors will survive, then competition, as contemplated by the Act, will continue unabated. That some competitors may suffer a reduction in traffic does not mean that the competition which benefits shippers will be diminished to any degree. We therefore must decide whether the Commission's determination that competitors will survive was reasonable.

Petitioners suggest two possible ways in which a CSX-ACL combination could eliminate bargeline competitors: predatory pricing, which prompted passage of the Act; and "rate scissors,"

a sophisticated form of predatory pricing by which a rail-barge combination lowers barge rates and recoups the loss by raising rail rates. The Commission found that neither practice could be successfully implemented by CSX-ACL.

Predatory pricing in these situations was a serious threat in 1912, when a well-financed railroad could absorb a short-term loss while driving less well-financed competitors off the water. The Commission found that predatory pricing would not succeed today, since the barge industry is now "comprised of a large number of firms, many owned or controlled by large and well-financed corporate parents." These large corporate parents, such as United States Steel and Archer Daniels Midland, are capable of absorbing some losses themselves without throwing in the towel. Further, the Commission reasoned that if predatory pricing could potentially succeed, one of these large corporate parents might already have attempted to eliminate their competitors. Because this has not occurred, the Commission inferred that market forces prevent it.

In the "rate scissors" scenario, a railroad theoretically may engage in predatory pricing without having to absorb any loss; it could, therefore, continue the practice long enough to discourage even the most well-financed competitor. "Rate scissors" is simply a scheme whereby the company sets its barge rates below what its competitors can bear, and makes up the difference in the rail rates it charges customers who have no alternative rail service.

The Commission dismissed the "rate scissors" threat as well, noting that many rail rates are constrained by competition or regulation. If the CSX rail rates rose, many shippers could turn to alternate non-rail options, such as trucks. There was evidence in the record suggesting that the rate scissors approach could actually cause CSX-ACL to lose business. Further, the Commission concluded that CSX-ACL would be likely to employ competing water carriers themselves, in instances where an ACL carrier did not provide the most efficient move-

ment. There was evidence in the record that ACL and other water carriers in fact already do contract outside their own companies when more efficient services are available.

The above factors alone indicate that the Commission's conclusion that neither predatory pricing nor rate scissors pose a genuine threat to competition is based on a reasoned appraisal of the evidence of record. But the Commission made additional findings that reinforce the conclusion that these threats are illusory. Most significantly, the Commission determined that there are no significant barriers to entry into the barge industry. This ease of entry would tend to discourage predatory practices, since any subsequent attempt to charge supracompetitive rates would likely be met by an influx of competitors undercutting that rate.

Petitioners object that the finding on ease of entry ignores overwhelming evidence to the contrary. They point to the testimony of several large bargeline executives who attempted to break into the market for coal hauls and incurred substantial losses before giving up. This, however, only shows that it is difficult to enter the market at present, when rates and service are presumably optimal, due to competition. The Commission only made the point that because there are no significant regulatory barriers to entry, and because economies of scale may be realized at a relatively low level, a bargeline may enter the market at a reasonable cost, and would be likely to do so should the prevailing rates become artificially high.

We reiterate that the record contains conflicting evidence on all of these points. But, again, our review is limited. When evidence exists to support more than one conclusion, it is best to leave the determination with the Commission, in deference to its familiarity with the industry.

We conclude that the Commission's interpretation of the Panama Canal Act was reasonable, and its application of the Act's exception was based on a reasoned and justifiable view of the evidence of record. We affirm the Commission's decision that the CSX-ACL merger does not violate the Act.

49 U.S.C. §§ 11343-11344 also apply to this transaction. Section 11343 provides that various transactions, including "consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties," may take place only with the Commission's approval and authorization. Section 11344(d) provides that, except in the case of the merger of two class I railroads, the Commission shall approve the transaction unless

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

The inquiry under section 11344 is broader than the previous inquiry, in that the Commission must consider the effect on competition in the industry generally, rather than just among bargelines. The Commission did this, and concluded that the transaction will have no adverse effects on either horizontal or vertical competition in the industry. The Commission's analysis is thorough and rooted in the record. *See* Commission Decision at 45-49. It is not our function to reconsider the issue *de novo* as petitioners would have us do.

Intervenor National Coal Association argues that the Commission failed to expressly weigh the anticompetitive effects against the public interest. This argument overlooks the Commission's conclusions that no anticompetitive effects would ensue and that the public interest would not be diminished. Given those findings, an explicit balancing of these two factors would be supererogatory. We affirm the Commission's ruling that the transaction is permissible under 49 U.S.C. § 11344.

We are also presented with a question regarding the Commission's authority to impose oversight conditions. Petitioners

argue that the Panama Canal Act grants no such authority to the Commission. As noted above, however, this transaction also falls within the compass of 49 U.S.C. § 11344. Section 11344(c) expressly provides that the Commission may impose conditions on any transaction approved under that section. Petitioners' argument to the contrary is without merit.

We also reject petitioners' contention that the Commission erred in deciding on the contested application without the benefit of an initial or recommended decision by an Administrative Law Judge. While an ALJ oversaw the hearings which generated the record, the Commission waived the requirement of a separate initial decision by the ALJ. Petitioners argue that this contravenes the Administrative Procedure Act, 5 U.S.C. § 557(b), which requires an initial decision by the person who presides at the hearings.

Section 557(b)(2), however, provides that, in rulemaking procedures or initial licensing applications, an agency may waive this requirement if the "due and timely execution of its functions imperatively and unavoidably" so require. The Commission waived the requirement on this ground.[3]

Petitioners object that this case involved neither a rulemaking nor an initial licensing and therefore no waiver is permitted. However, both 49 U.S.C. § 10327(c) and 49 U.S.C. § 11345(f) expressly provide that, in proceedings such as the instant one, the Commission may waive the initial ALJ decision if such waiver is required "for the timely execution of its functions." It is true, as petitioners point out, that statutes may not be interpreted to modify the hearing provisions of the Administrative Procedure Act except to the extent that they do so expressly. *See* 5 U.S.C. § 559. We find, however, that sections

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[3] "Timely execution" of the Commission's functions in this instance meant adherence to 49 U.S.C. § 11345(c)(3)'s requirement that the Commission issue a final decision "by the 90th day after the date on which it concludes the evidentiary proceedings."

10327(c) and 11345(f) constitute express modifications. It was therefore within the Commission's discretion to waive an initial decision in attempting to comply with statutorily imposed time limits.[4]

Petitioner Simmons, the Illinois Legislative Director for the United Transportation Union, takes issue with the Commission's failure to consider the impact upon and impose protective conditions for employees of non-CSX railroads. He points out that 49 U.S.C. 11344(b)(1)(B) specifically provides that the Commission shall consider "the interest of carrier employees affected by the proposed transaction." He cites our decision in *Detroit, Toledo & Ironton R. Co.* v. *United States*, 725 F.2d 47 (6th Cir. 1984), in support of his argument that we ought to apply this provision in the instant case. *See id.* at 50 n.2.

Section 11344(b), however, is expressly restricted to mergers involving at least two class I railroads. *Detroit, Toledo & Ironton* involved such a merger. The instant case does not. The instant case is subject to the provisions of section 11344(d), covering mergers other than of class I railroads. Section 11344(d) does not contain a requirement similar to section 11344(b)'s requirement to consider the impact on all carrier employees. Section 11344(d) requires only that the Commission consider the public interest. Since section 11344(b) also specifically requires consideration of the public interest, in addition to consideration of the effect on employees, we conclude that Congress did not contemplate that the general notion of "public interest" included the concern about effect on employees.

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[4] Petitioners' primary concern over the waiver of an ALJ decision is that they were denied the potential benefit of conclusions the ALJ would have made regarding witness credibility. In this respect, however, it does not appear that petitioners suffered any real harm. Witness credibility would bear only on a limited range of issues in the instant case. The major issues are tied less to the question of whose purported facts to believe than to the question of how to analyze economic data and presage market behavior. Witness credibility plays little or no role in answering this question.

Simmons argues that *I.C.C.* v. *Railway Labor Association*, 315 U.S. 373 (1942), and *United States* v. *Lowden*, 308 U.S. 225 (1939), hold that, as a matter of law, the general term "public interest," in railroad transactions, includes the interest of railroad employees. We find that *Railway Labor* and *Lowden* are inapposite. Each case basically held that because the Commission had authority to impose conditions in furtherance of the public interest, it could impose restrictions designed to protect the employees of railroads directly involved in transactions requiring Commission approval. Neither case goes on to hold that "public interest" necessarily includes the interest of employees not directly affected. We hold that the Commission was not required to consider the interests of such employees in the instant transaction.

Simmons also argues that 49 U.S.C. § 11347 requires the Commission to impose protective conditions for the benefit of non-CSX rail employees. Section 11347 provides that in transactions under sections 11344 and 11345, the Commission "shall require the carrier to provide a fair arrangement . . . protective of the interest of employees who are affected by the transaction. . . ."

Simmons acknowledges that there is a "split" as to whether this provision applies to employees of carriers not directly involved in the transaction. It is not a very serious split, however. Every court of appeals that has considered the question has concluded that section 11347 does not apply to employees not directly involved in the transaction. *See Southern Pacific Transportation Co.* v. *I.C.C.*, 736 F.2d 708, 725 (D.C. Cir. 1984); *Lamoille Valley Railroad* v. *I.C.C.*, 711 F.2d 295, 323-34 (D.C. Cir. 1983); *Brotherhood of Maintenance of Way Employees* v. *I.C.C.*, 698 F.2d 315, 316-18 (7th Cir. 1983), *cert. denied*, 105 S.Ct. 1172 (1985). Simmons cites two district court opinions to the contrary, *Soo Line Railroad Co.* v. *United States*, 280 F.Supp. 907 (D. Minn. 1968), and *Railway Labor Executives' Association* v. *United States*, 216 F.Supp. 101 (E.D. Va. 1963).

In *Railway Labor*, the court interpreted the statute to require protection of employees whom the Commission conceded would be affected even though they were not employed by the railroad involved in the transaction. The court found that although the Chesapeake & Ohio Railway Company was not actually a party to the Commission proceeding, it was "in actuality deeply and unavoidably involved," and that, due to overlapping interests in a particular train station, many Chesapeake employees "were in reality, though not in contract, as much the employees of Seaboard [the acquiring party before the ICC] as of Chesapeake." 216 F.Supp. at 103. The court therefore looked only at employees so intimately connected with the transaction as to be "affected" in a meaningful sense. *Railway Labor*, therefore, does not stand for the broad proposition Simmons urges.

Only *Soo Lines* stands for the broad proposition that protection must be afforded to all rail employees. *See* 280 F.Supp. 907, 923-26. We reject the reasoning employed in *Soo Lines* because it fails to give any meaning to the statute's use of the word "affected." Had Congress intended such broad protection, it would not have limited its grant of protection to carrier employees "affected by the transaction." We hold that section 11347 did not require the Commission to impose protective conditions for the benefit of non-CSX rail employees.

Led by TVA, petitioners contend that the Commission's environmental review of the proposed merger is inadequate under the National Environmental Protection Act, 42 U.S.C. § 4321-4347 (NEPA). NEPA requires that an agency prepare an Environmental Impact Statement (EIS) before approving any major action that will significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). To determine whether the effect on the environment will be significant enough to warrant an EIS, agencies prepare an environmental assessment (EA). 40 C.F.R. § 1501.4(b)-(c).

An agency decision, based on an EA, that no EIS is required, can be overturned only if it is arbitrary, capricious, or an abuse of discretion. *See Sierra Club* v. *Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983); *Cabinet Mountains Wilderness* v. *Peterson*, 685 F.2d 678, 681 (D.C. Cir. 1982). It is not for us to substitute our judgment of the environmental impact for the judgment of the agency, once the agency has adequately studied the issue. It is our role, however, to determine whether the agency has, in fact, adequately studied the issue and taken a "hard look" at the environmental consequences of its decision. *See Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Sierra Club* v. *Peterson*, *supra*.

In the instant case, the Commission, pursuant to its regulations, directed its Section of Energy and Environment (SEE) to prepare an EA. The EA concluded that the consolidation would have no significant impact warranting preparation of an EIS. The EA purported to examine two sources of potential environmental impact: impacts arising from market extensions of carrier operations and impacts arising from capital improvements projects, such as the three intermodal transfer structures that CSX proposed to construct following approval of the merger.[5]

The Commission concedes that the scope of its analysis was limited with respect to the contemplated intermodal transfer facilities. The Commission justifies the limited scope on two grounds: first, that the lack of final design and engineering plans made it impossible to conduct an in-depth analysis; and, second, that before the facilities could actually be constructed, in-depth environmental review would be conducted by other authorities.[6]

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[5] CSX indicated that, subsequent to the merger, it would seek approval to build new rail-barge transloading facilities at Decatur, Alabama and Philadelphia, Pennsylvania, and to upgrade and add to an existing facility at Louisville, Kentucky.

[6] The Commission notes that construction at the Louisville site would require some form of approval by the United States Army Corps of Engineers, the Federal Railway Administration, the Kentucky Department of Transportation, the Kentucky Department of Environmental Protection and the Jeffer-

Petitioners argue that NEPA requires some degree of speculative forecasting and that, therefore, the lack of definite design information does not justify the Commission's limited analysis. *See, e.g., Scientists' Institute for Public Information, Inc.* v. *Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). We would agree that the lack of final design plans does not excuse an agency from conducting the most thorough analysis possible of a proposed action. In the instant case, however, the Commission did not have before it a proposal to construct intermodal transfer facilities. Rather, the Commission was addressing a proposal that two companies merge. The merger does not inherently require construction of new facilities.

When construction of the new facilities is proposed, the Commission will not be the authority charged with responsibility for deciding on the proposal or preparing any environmental analyses with respect to it. These contemplated facilities are significantly removed from the proposal the Commission was approving. Petitioners argue that CSX and ACL would not desire the merger if they could not build the new facilities. That, however, is a risk that CSX and ACL choose to take. The Commission's decision in no way permits, nor could it permit, CSX-ACL to construct the contemplated facilities.[7]

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son County Air Pollution Control Office; construction at the Decatur site would require approval by the Army Corps of Engineers, TVA and the Alabama Department of Environmental Management; construction at the Philadelphia site would require approval at least by the Philadelphia Water Department and the Philadelphia Department of Licenses and Permits.

[7] Petitioners also contend that it is arbitrary for the Commission to view these projects as too speculative for environmental analysis on the one hand, but definite enough to amount to public benefits of the merger on the other hand. We agree that the Commission's dual approach to the projects is troubling on the surface, but our analysis of the public benefits issue renders this concern moot. The Commission's discussion of the public benefits of the merger included reference to the efficiencies to be gained from projects such as these. As we said in our earlier discussion of the Panama Canal Act, however, the Commission did not need to go so far as to find increased public benefits, but only that there would be no diminution of public benefits. This conclusion

We believe this is precisely the type of situation to which the Supreme Court spoke in *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.20 (1976), where it wrote that NEPA

> speaks solely in terms of *proposed* actions; it does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions. Should contemplated actions later reach the stage of actual proposals, impact statements on them will take into account the effect of their approach upon the existing environment; and the condition of that environment presumably will reflect earlier proposed actions and their effects.

We do not believe that, in assessing the environmental impact of the merger, the Commission was obligated to assess the impact of contemplated projects which the Commission has no power to approve, which are not an inherent component of the proposed merger, and which will be subject to environmental review should they ever reach the actual proposal stage.

The Commission's assessment of the environmental impact of traffic increases which may potentially flow from CSX-ACL's operational changes presents a more difficult problem. 49 C.F.R. § 1105.7 requires merger applicants to file an Environmental Report (ER) answering, among other things, the following question:

> Will the proposed action result in (i) a minimum increase in rail traffic of 50 percent or three trains per day on an affected rail line, (ii) an increase in rail yard activity of 20 percent as measured in carload activity or (iii) an increase in motor carrier traffic of either 50 vehicles per day or an increase in truck traffic exceeding 10 percent of the average daily traffic on a given highway segment?

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would have been reached by the Commission even without the slightest suggestion that such plants might someday be built. In any event, that the Commission believed construction of the facilities to be probable enough to merit consideration as a peripheral public benefit of the merger did not in itself place the facilities within the scope of issues calling for an environmental analysis by the Commission.

49 C.F.R. § 1105.7(c)(5). If any of those three thresholds will be exceeded, the applicant is required to address, in the ER, the issues of increased air emissions and increased noise levels.

The EA expressly dealt with thresholds (i) and (ii), but did not directly address threshold (iii). When TVA pointed this out in its comments on the EA, the Commission responded, in its Supplemental EA, by stating that, "It is difficult to respond to these arguments except to point out that TVA is simply speculating as to what the actual highway traffic increase might be." Supplemental EA at 18.

It is unclear whether the Commission's statement in the EA meant that it was speculative whether CSX-ACL would obtain certain Texas utilities as customers and what percentage of their coal needs it would supply or whether it overlooked CSX-ACL's comments in which it conceded, that based on certain assumptions "an increase of more than 50 vehicles per day would be experienced for the entire route from each barge unloading site to [certain utilities]."[8] Comments of CSX and ACL at 14.

In light of the opening paragraph of the Supplemental EA which states,

> We do not believe that CSX-ACL's proposals for capital improvement and operation change have been developed to a point where more meaningful environmental analysis of these proposals is possible,

it is reasonable to infer that the Commission took the hard look and concluded that this was not a proposed action. This is confirmed by the Commission's opinion.

> Several commenting parties argue that the environmental consequences of Commission approval of the consolidation warrant preparation of an environmental impact statement (EIS). They contend that NEPA requires that

[8] Presumably, this increase in traffic would result from CSX-ACL's successful diversion of traffic from competitors which currently ship point to point by rail only, to CSX-ACL, which would make the same point to point shipment by rail-barge-truck, thus adding truck traffic where none had previously existed.

we assess in detail the impacts of the ten potential operational changes and three contemplated capital improvement projects. We disagree. Applicants' proposals for capital improvement and operational changes have not been developed to a point where more meaningful environmental analysis of these proposals is possible. Applicants' proposed operating plan considers potential changes and improvements illustrative of what would or might occur as a result of the consolidation. The exact nature or form of the changes and improvements with respect to environmental analysis is at this point still speculative.

* * *

The proposed action before us is our approval of the consolidation. We must consider the environmental impacts of that approval. We are not required, however, to consider the possible environmental impacts of less imminent actions. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.20 (1976). Applicants' contemplated intermodal plans are less imminent actions. TVA argues that we are the only agency in a position to look at the cumulative impacts of our approval of the consolidation. In respect to such cumulative impacts, however, we are not required to consider actions that are merely contemplated. *Hart and Miller, Etc.* v. *Corps of Engineers, Etc.*, 505 F.Supp. 732, 752 (1980). Furthermore, because applicants have alternate location, for their contemplated facilities on the Tennessee and Ohio Rivers, their plans are not proposed actions. *South La. Environmental Council, Inc.* v. *Sand*, 629 F.2d 1005, 1015-16 (1980).

Commission Decision at 64 & 65. The Commission has taken the requisite hard look.

Accordingly, the decision of the Commission is affirmed.

TIMBERS, *Circuit Judge*, dissenting. I regret that I am unable to join in Judge Kennedy's thoughtful, comprehensive majority opinion. I am unable to do so because in my view the ICC has erroneously interpreted and applied the Panama Canal Act, 49 U.S.C. § 11321 (1982) (the "Act"), so as to approve for the first time during the seventy-three year history of the Act the acquisition by a railroad of a bargeline.[1] Today's decision by our Court is one of first impression among the courts of the United States, for no court has ever approved such an acquisition. The acquisition in question is one of enormous importance: it concerns the acquisition by the nation's second largest railroad (CSX Corporation) of American Commercial Lines, Inc. (ACL), which owns the nation's largest bargeline. In approving the acquisition, the ICC rejected and overruled its own prior controlling decisions.

While the independent regulatory agencies, such as the ICC, have broad discretionary power when acting pursuant to their statutory mandates, that discretion is not unbridled. It is the responsibility of the reviewing courts to see to it that the law has been properly interpreted and applied, and that the decision in question has been based on substantial evidence.[2] *Northern Lines Merger Cases*, 396 U.S. 491, 503 (1970). Regardless of the ultimate merits, or even lawfulness, of the acquisition here in question, I am convinced that the ICC plainly failed to apply the proper legal standards under the Act. In short, the ICC's new interpretation of the Act is *not* "sufficiently reasonable". *See* majority op. at 6. In my view, the ICC decision should be vacated and the case should be remanded for proceedings in accordance with proper legal standards. *See Coal Exporters Ass'n* v. *United States*, 745 F.2d 76, 80 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3769 (U.S. April 30, 1985).

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[1] Throughout this dissenting opinion, the transaction involved is referred to interchangeably as an "acquisition" or "merger".

[2] Since I believe that the Act has been improperly interpreted and applied by the ICC, this dissenting opinion is addressed solely to that issue, it being neither necessary nor appropriate in my view to reach any other issues.

I.

Several aspects of the ICC's decision raise especially serious doubts about the result reached. I agree with the majority's holding that the Act does not provide for an absolute prohibtion of railroad ownership of bargelines. I do take issue, however, with the method by which the ICC and the majority conclude that *this* acquisition is permitted under the Act. The essential, and fatal, error upon which the ICC's decision is based, is its utter failure to consider the effect of this acquisition on competition between railroads and bargelines. Since the very *purpose* of the Act was to foster and maintain rail/barge competition, this failure strikes me as curious. Indeed, it suggests an attempt to frame the analysis in such a way as to support a result-oriented decision.

While I acknowledge that the majority's statement of the facts is straightforward and accurate, the following brief reference to some of the relevant facts as found by the ICC may help to place in perspective the issue to which this dissent is addressed.

CSX and its rail subsidiaries operate over 27,000 miles of track. CSX is the leading carrier of solid bulk commodities by any mode. In 1981, for example, CSX moved 541 million tons of traffic. This constitutes one-half of all coal and chemical shipments and nearly one-third of all agricultural products shipped by rail in the eastern United States. Most importantly, CSX controls primary access to one-half of all the rail/barge coal-loading capacity on the Ohio River system, including *all* of the terminals along one important 300 mile stretch of the Ohio River. CSX and two other railroads account for 86% of *all* eastern Class I rail revenues. Revenues for 1982 totalled nearly $5 billion, with net income for that year amounting to $338,400,000.

ACL operates its barge lines over 7,500 miles of the 15,000 miles of inland waterways. ACL is the nation's largest line-haul bargeline. ACL is one of the top three for-hire bargelines in the

transport of coal, chemicals and agricultural products on the inland waterways. ACL and five other carriers transport 70% of *all* eastern coal shipments to utilities along water routes. ACL's revenues for 1982 totalled $295,000,000, with net income for that year amounting to $21,000,000.

CSX and ACL *directly* compete for customers to transport coal, chemicals and agricultural products in 12 states and 59 metropolitan areas, including Chicago, Cincinnati, Louisville, Memphis, Mobile, New Orleans and Pittsburgh. CSX and ACL *directly* compete at 163 points along the inland waterway system in these states. Thirty utility plants have the capacity to receive either the rail or water services provided by CSX and ACL.

II.

The ICC found that CSX and ACL compete in three ways. First, they directly compete for business to and from the 163 points along the water route mentioned above *and* to and from points within a band extending 25 to 200 miles on either side of the water route, depending on circumstances. Second, they compete for service to the same destination from different points of origin where the end-user has the option of buying from two different sellers, one with access to water routes and the other with access to rail routes. Third, there is some competition for the carriage of goods and commodities where both destination and origin are different but the products compete in the same end-use market.

Thus, the ICC found that ACL and CSX actually do compete for traffic. Indeed, absent such direct competition, ICC approval of the acquisition would not be required. The Act only prohibits a rail carrier from maintaining an interest in a water carrier "with which it does or may compete for traffic." 49 U.S.C. § 11321(a)(1) (1982). The ICC referred to specific examples of instances in which CSX and ACL sought traffic from the same shipper, including a bidding competition to supply the Tennessee Valley Authority's Cumberland, Tennessee,

plant. CSX and ACL submitted the two lowest bids, with ACL eventually winning the contract to supply 120 million tons of coal over a 20 year period.

Nevertheless, in pursuing its analysis under § 11321(b), the ICC completely disregarded the effect of the acquisition on rail/barge competition and considered only competition among water carriers. In defining the relevant product market, the ICC stated it would "focus on water carrier transportation". (Dec. at 24). In its view, railroads are not effective constraints on barge rates because barge rates are so much lower. I believe that this conclusion reached by the ICC is highly questionable and probably erroneous—for the following reasons.

First, this conclusion ignores the ICC's other finding that ACL and CSX *directly* compete for *the same traffic*. Second, it ignores specific instances in which CSX and ACL were the two lowest bidders on the same contract, such as the TVA's Cumberland plant contract. Third, it ignores the historic ability of railroads in general, and CSX in particular (as demonstrated by the evidence), to reduce rates to levels that are competitive with barges. P.D. Locklin, Economics of Transportation 729 (6th ed. 1966); Mapes, *Competition Between Railroads and Water Carriers: A Comparison of the Regulatory and Antitrust Approaches and a Proposal for Reform*, 39 U. Pitt. L. Rev. 653, 657 (1978). Fourth, it ignores the ICC's own prior decisions in which it relied on the competition provided by barges to justify railroad mergers. In *CSX Corp.—Control—Chessie System, Inc., and Seaboard Coast Line Indus., Inc.*, 363 I.C.C. 521 (1980), for example, the ICC approved the consolidation of three railroads which now constitute the present CSX. The ICC stated at that time that "[t]he affiliated carriers will be able to compete more effectively with truck and *barge operations*" (emphasis added) by offering "single-system service" to shippers. *Id.* at 563. *See also Norfolk Southern Corp.—Control—Norfolk & W. Ry.*, 366 I.C.C. 173, 201-02 (1983). The ICC's convenient manipulation of the facts and the law to reach the result it did in the instant case strikes me as nothing short of astounding.

The ICC's slight of hand, moreover, does not end there. On this appeal, it argues that § 11321(b) is concerned only with competition among *water carriers* on the route in question and that competition between the rail and water carriers involved in the acquisition is irrelevant. It argues that § 11321(b) would be superfluous if rail/barge competition were considered because § 11321(a) requires direct competition for the section to be operable and in every such case some reduction of competition will result.

In its decision in this very case, however, the ICC has defined the competitive analysis under § 11321(b) as follows:

> "The involved competition has many facets. Competition *between the involved water carrier and the acquiring railroads*, between the involved water carrier and other water carriers, and among the non-included water carriers all may effect the level of competition on the water route in question." (Dec. at 18) (emphasis added)

This standard is consistent with the ICC's decisions in prior similar cases. *E.g., Illinois Central R. Co.—Control—John I. Hay Co.*, 317 I.C.C. 39, 55 (1962); *Lake Line Applications Under Panama Canal Act*, 33 I.C.C. 699, 715-16 (1915). In short, the ICC either has failed to follow its *own* interpretation of the statute in its decision in the instant case or it seeks to alter that interpretation on appeal in an attempt to avoid what even it thought would likely be an adverse result.

Unhappily, this is not the first time that the ICC has resorted to such questionable attempts to impose its will over that of Congress. It has not been successful in the past. As the District of Columbia Circuit so succinctly stated in vacating another result-oriented ICC decision, "[a]n agency cannot hide the standards under which it operates, for we are unable to evaluate whether its reasoning meets the reasoned decision making requirement unless we know against what standards its factual findings have been judged." *Coal Exporters, supra*, 745 F.2d at 99; *see also id.* at 90.

Whatever deference must be accorded "the interpretation of a statute by an agency charged with its enforcement", *Meade Township* v. *Andrus*, 695 F.2d 1006, 1009 (6th Cir. 1982), such an agency, at the very least, must be held to its *own* interpretation. While an agency may not be "disqualified from changing its mind", it must give sufficient reasons for its new interpretation. Otherwise, a reviewing court cannot "approach the statutory construction issue...with[] regard to the administrative understanding of the statute[]." *NLRB* v. *Local Union No. 103*, 434 U.S. 335, 351 (1978); *see* majority op. at 13. No reasons whatsoever were given by the ICC for the broad change in its interpretation of the Act in the instant case.

Moreover, the ICC's new interpretation of the Act utterly fails to satisfy Congress' intent to prohibit all rail/barge mergers that effect *any* reduction in competition on the water routes in question. 49 U.S.C. § 11321(b) (ICC may permit merger of rail and bargelines only if "it will still allow competition, *without reduction*, on the water route in question.") (emphasis added). Aside from the ICC's own past practice of examining the level of rail/barge competition, basic competition principles require such an examination to determine the effect of the merger, not only on rail/barge competition, but on competition among bargelines as well.

This merger has vertical as well as horizontal aspects in that CSX transports cargo from inland points to points on the water's edge for loading on barges. Of all the coal shippers in CSX's operating region, 85% are limited to using CSX. Compounding this control is CSX's substantial control of rail/barge loading terminals along the most significant coal transport water routes. Accordingly, the ICC concluded that "the merger is likely to lead to diversion to [ACL] from other carriers of some CSX-originated traffic". (Dec. at 44). The ICC assumes, however, that only a small amount of such traffic will be diverted to ACL because ACL will not always be the most "cost effective barge partner for CSX". (Dec. at 43).

Even if only "some" traffic in this concentrated market is diverted to ACL *solely* because ACL is affiliated with CSX, necessarily there has been a prohibited reduction in *competition*. Moreover, the ICC made no attempt to ascertain the extent to which other water carriers will be foreclosed from this traffic; it only assumed the amount would be "small". Finally, the assumption that other barge carriers will have a nearly equal opportunity to compete with ACL for CSX-generated traffic is belied by the ICC's heavy emphasis on the supposed "efficiencies" that will result from this merger. If those "efficiencies" are as great as the ICC suggests, other water carriers will not be able to compete effectively with ACL even if given the opportunity; and, it can be predicted, the ICC will rely in the future on this imbalance to justify mergers of other water carriers with railroads, ultimately defeating Congress' goal of separate ownership of water and rail carriers.

Most significant for the instant case, however, is the potential for predatory pricing designed to drive other water carriers from ACL's routes. Such an attempt to monopolize would be made possible by the railroad's ability to "subsidize" reduced rates on water routes with higher rates on all-rail routes. While it is true that an *increase* in price, made possible by ACL-CSX achieving market power, *might* encourage other barge operators to enter the market, the real danger lies in driving competitors from ACL's water route with price *reductions*.

The ICC discounted this admittedly real possibility by stating that

> "The barge industry is comprised of a large number of firms, many owned or controlled by large and well-financed corporate parents. . . . It would not be in the best interests of these large corporate parents to sit back and allow CSX-ACBL to destroy their investments in the barge industry. Instead, they could be expected to exert pressure on CSX, both through antitrust actions and competitive responses, to forego any attempt to monopolize the market. . . ." (Dec. at 36).

Such abdication of responsibility on the part of ICC makes a mockery of its regulatory functions. It is difficult to fathom this reasoning—by any agency created to regulate an industry of the very highest national priority—which suggests that *private enterprise* must fill the role entrusted to the ICC, and that private antitrust actions are the most efficient way to preserve the competitive market that Congress intended in enacting the Panama Canal Act. Congress already has recognized the inadvisability of this proposition. Under 49 U.S.C. § 11341(a) (1982), ICC approval of a carrier consolidation immunizes the transaction from the applicability of the antitrust laws. By building competitive principles into Panama Canal Act, Congress clearly intended not only that the ICC *regulate* rail/barge consolidations in the public interest but also that the ICC *police* competition in the two industries.

As the ICC itself held in *Lake Line Applications Under Panama Canal Act*, 33 I.C.C. 699 (1915), in which divestiture of bargelines by the railroads was first ordered:

> "These boat lines under the control of the petitioning railroads have been first a sword and then a shield. When these roads succeeded in gaining control of the boat lines which had been in competition with parallelling rails in which they were interested, and later effected their combination . . ., by which they were able to and did drive all independent boats from the through lake-and-rail transportation, they thereby destroyed the possibility of competition with their railroads other than such competition as they were of a mind to permit. Having disposed of real competition via the lakes, these boats are now held as a shield against possible competition of new independents. Since it appears from the records that the railroads are able to operate their boat lines at a loss where there is now no competition from independent lines, it is manifest that they could and would operate at a further loss in a rate war against independents. The large financial resources of

> the owning railroads make it impossible for an independent to engage in a rate war with a boat line so financed." *Id.* at 716.

The ICC's argument that rail/barge competition is irrelevant to the determination of whether a merger will reduce competition on water routes is confounded by the facts and by its own prior decisions.

The majority's two paragraph discussion of this issue strikes me as blinking at a most serious deficiency in the ICC decision. *See* majority op. at 13-14. While it is true that "[b]arges, not trains, operate on water routes", in the Act Congress obviously concluded that railroad entry into the barge market might have an adverse effect on competition for water routes. Moreover, in view of the structure of the industries, it was well nigh impossible for the ICC "reasonably" to conclude that it could disregard rail/barge competition when considering the effects of a merger on a given water route.

It appears that, despite more than 70 years of separate ownership of barge and rail lines, during which time, as the ICC itself stated, "the barge industry has developed into an efficient, effective competitor for intercity freight traffic" (Dec. at 14), if the instant ICC decision is permitted to stand, history will be allowed to repeat itself and the very evil the Panama Canal Act was intended to prohibit will be permitted to flourish.

III.

To summarize:

The ICC has failed to consider the effect of the acquisition on rail/barge competition—as has been the ICC's practice in prior cases—and has failed to consider the effect that a reduction in rail and water competition would have on purely water carrier competition.

Until Congress sees fit to amend or repeal the Panama Canal Act—something it has repeatedly refused to do—the ICC and the courts are duty-bound to apply it properly. Since I am convinced that the ICC has committed serious errors of law in its interpretation and application of the Act, I would vacate the decision of the ICC and remand the case for further proceedings in accordance with proper legal standards. From the majority's refusal to do so, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOS. 84-3743 THRU 84-3753, 84-3842/84-3868

CROUNSE CORPORATION, ET AL.,
PETITIONERS,

v.

INTERSTATE COMMERCE COMMISSION
AND UNITED STATES OF AMERICA,
RESPONDENTS.

Before:
KENNEDY and KRUPANSKY, *Circuit Judges*;
and TIMBERS, *Senior Circuit Judge*.

JUDGMENT

ON PETITION TO REVIEW a decision of the Interstate Commerce Commission.

THIS CAUSE came on to be heard on the transcript of record from the said Agency and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said Agency in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, Clerk
(s) JOHN P. HEHMAN, Clerk

FILED
JAN. 23, 1986
JOHN P. HEHMAN, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 84-3743 thru 84-3753, 84-3842/84-3868

CROUNSE CORPORATION, ET AL.,
PETITIONERS,

v.

INTERSTATE COMMERCE COMMISSION and THE UNITED STATES OF AMERICA,
RESPONDENTS.

Before:

Lively, *Chief Judge*, Engel, Keith, Merritt, Kennedy, Martin, Jones, Contie, Krupansky, Wellford, Milburn, Guy, Nelson and Ryan, *Circuit Judges*

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered by Order of the Court
(s) John P. Hehman
John P. Hehman, Clerk

FILED
Mar. 28, 1986
John P. Hehman, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 84-3743 thru 84-3753, 84-3842/84-3868

CROUNSE CORPORATION, ET AL.,
PETITIONERS,

v.

INTERSTATE COMMERCE COMMISSION and THE UNITED STATES OF AMERICA,
RESPONDENTS.

Before:

ENGEL, KEITH, MERRITT, KENNEDY, MARTIN, JONES, CONTIE, KRUPANSKY, MILBURN, GUY, NELSON and RYAN, *Circuit Judges* *

ORDER

Upon consideration, it is ORDERED that the order entered in this case on March 28, 1986 denying the petition for rehearing en banc be amended to add the following dissents:

"MERRITT, Circuit Judge, dissenting from denial of petition for rehearing en banc, in which Circuit Judges Keith, Martin and Jones joined. Jones, J. delivered a separate dissent.

"I believe that we should have granted rehearing en banc in this important antitrust case. Congress has enacted a law flatly prohibiting a merger between a railroad and a barge line if that merger results in *any* reduction in competition. Never before has a railroad been permitted to merge with a competing barge line, regardless of the political cast or regulatory philosophy of the Commission or the antitrust philosophy of the courts. Yet in this

* Chief Judge Lively and Circuit Judge Wellford recused themselves from participation in this case.

case the Interstate Commerce Commission has refused to look at what effect the merger of the largest railroad east of the Mississippi with the largest barge line in the nation will have on rail-barge competition, and at whether the lessening of rail-barge competition will lead to a lessening of competition among barge lines. As Judge Timbers correctly observes in his dissent, such refusal is an "abdication of responsibility on the part of the ICC" that "makes a mockery of its regulatory functions." Slip op. at 40. We do not perform our judicial function when we uphold it.

"In terms of its economic impact, this case is significant. Our decision will affect the price of coal, grain, and other commodities for many years in the Ohio and Tennessee Valleys and beyond. The railroad in question controls 50% of the barge terminals on the river system in question, and all of the terminals on large stretches thereof. If, after buying the barge line in question, the railroad restricts the use of its terminals to that barge company, it will eliminate competition among barge lines that haul coal and other commodities to and from those terminals. Given the number of terminals involved, it is inconceivable that the merger in question will not result in a reduction of competition on the water routes in question.

"Yet that—no reduction in competition—is what Congress required the Commission to find before permitting the merger of a railroad with a barge line. 49 U.S.C. § 11321(b). It is nonsense to suggest, as the Commission does, that any anti-competitive effects of the merger will be remedied by competitive pressures and private antitrust actions. The size of the parties being merged, their market shares, and the near-stranglehold that the resulting entity will have on many routes, makes it unlikely that competitive pressures will prevent the misuse of its market power, which is precisely why Congress forbade such mergers in the first place. And the statute in question, the Panama Canal Act, immunizes ICC-

sanctioned mergers from the antitrust laws, thus eliminating any chance of the private antitrust actions in which the commission rests its faith. *See* 49 U.S.C. § 11341(a) (1982).

"Congress presumably knew what it was doing when it found, after considerable investigation and debate, that mergers such as the one in question posed serious dangers to the freedom of transportation markets. The provision in question was reenacted, after considerable debate, some years later in 1940. Perhaps, as the majority opinion seems to suggest (slip op. at 7, 11), predatory pricing is not the serious threat that it was in 1912 (or even in 1940), so that the policy behind the statute is obsolete. However, it is not generally the province of courts to make such determinations. Even if the Commission and the courts think it foolish and outdated to bar mergers between railroads and barge lines except where competition is not affected, Congress has declared otherwise and we are bound to respect that declaration. For these reasons, and for those expressed in Judge Timbers' dissent, I believe that the panel's majority erred in affirming the Commission's decision to approve the merger and that we should reconsider the case en banc.

"JONES, *Circuit Judge.* I join in Judge Merritt's dissent to the denial of the petition for rehearing en banc out of concern for the importance of the issue which is so well stated therein. It is my view that the issue invites and requires the attention of the full court. I regret that an en banc exploration will not occur."

ENTERED BY ORDER OF THE COURT
(s) JOHN P. HEHMAN
JOHN P. HEHMAN, Clerk

FILED
APR. 11, 1986
JOHN P. HEHMAN, Clerk

APPENDIX E

INTERSTATE COMMERCE COMMISSION
DECISION
FINANCE DOCKET NO. 30300
CSX CORPORATION-CONTROL-
AMERICAN COMMERCIAL LINES, INC.
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CSX Corporation-Control-American Commercial Lines, Inc.

Decided: August 27, 1984

Acquisition of control of American Commercial Lines, Inc., and its water carrier subsidiary American Commercial Barge Lines Company is authorized, subject to conditions.

Mark Aron, Alan Geolot, David M. Levy, R. Eden Martin, G. Paul Moates, Michael Nemeroff, John J. Paylor, and *Vincent P. Prada* for applicant CSX Corporation.

Richard B. Felder, Michael Harris, Kathryn H. Klassen, and *Charles H. White, Jr.,* for applicant American Commercial Lines, Inc.

Robert M. Bruskin, Roxann Henry, Paul A. Koches, Suzanne Nyland, Eberhard Phailer, A. Duncan Whitaker, and *Alan M. Wiseman* for American Waterways Operators, Inc.

Smith R. Brittingham III, Gregory M. Gordon, Mark E. Staib, and *Richard A. Zellner* for Water Transport Association, Canal Barge Company, Inc., Crounse Corporation, Dixie Carriers, Inc., S.C. Loveland Company, M/G Transport Services, Inc., The Ohio River Company, SCNO Barge Lines, Inc., and the Valley Line Company.

Peter A. Gabauer and *Robert F. Stauffer* for National Coal Association.

Donald G. Avery for Louisville and Jefferson County Port Authority and Eastern Coal Transportation Conference.

James F. Bromley and *Donald MacLeay* for Tampa Electric Company, Gatliff Coal Company, and TECO Transport & Trade Corporation.

Edward H. Comer, Michael F. McBride, and *Leonard M. Trosten* for Edison Electric Institute.

George J. Ryan for Lake Carriers Association.

John Barry Kelly II, Brent R. Marquand, Herbert S. Sanger, Gregory R. Signer, and *Lewis E. Wallace* for Tennessee Valley Authority.

Arthur Perry Bruder and *Paul Phillips* for United States Department of Energy.

Rosalind A. Knapp, Diane R. Liff, Jim J. Marquez, James P. Moore, Joseph Pomponio, and *Mary Bennett Reed* for United States Department of Transportation.

Gordon MacDougal for Patrick W. Simmons, Illinois Legislative Director for United Transportation Union.

William L. Hammond, John A. Matta, John A. Vuono, and *Richard R. Wilson* for PPG Industries, Inc.

Donald A. Tracy for United States Department of Agriculture.

Priscilla R. Budeiri, Douglas H. Ginsberg, J. Paul McGrath, James R. Rattner, Elliott M. Seiden, R. Timothy Slattery, and *James R. Weiss* for United States Department of Justice.

DECISION

BY THE COMMISSION:

I. INTRODUCTION

A. Summary of the Decision.

General. On November 4, 1983, CSX Corporation (CSX) and American Commercial Lines, Inc. (ACL) jointly filed an application under 49 U.S.C. 11321, 11343, and 11344 seeking authority for CSX to acquire control of ACL and its certificated water carrier subsidiary, American Commercial Barge Line Company (ACBL).[1] No related applications were filed. On November 25, 1983, applicants filed their response to the supplemental information request contained in Decision No. 3, served October 19, 1983.

We accepted the application and supplementary information for filing and published notice of acceptance in the *Federal Register* on December 2, 1983, 48 Fed. Reg. 54402 (1983).

Many shippers and several States filed comments in support of the proposed consolidation, while a number of shippers, States, utilities, water carriers, and labor organizations filed statements in opposition. Several conditions, such as labor protection, route, rate, traffic protection, and reporting requirements were sought. No responsive applications were filed.

Public hearings on the application were conducted by Chief Administrative Law Judge David H. Allard from February 22, 1984, to May 11, 1984. The evidentiary record was closed on June 18, 1984. Oral argument was heard June 21, 1984. An open voting conference was held on July 24, 1984.

The application seeks authority for CSX to acquire and exercise control over ACL and its carrier subsidiary, ACBL. CSX has already acquired ACL's corporate parent, Texas Gas Resources Corporation (TGR). The ACL stock has been placed in an independent voting trust. Under the proposed transaction,

---

[1] The list of abbreviations used throughout this decision may be found in Appendix A. Reference to CSX embraces its rail carrier subsidiaries, including the C&O, B&O, and SBD. Reference to ACL includes its water carrier subsidiary, ACBL.

the voting trust would be dissolved and ACL will become a direct subsidiary of CSX. ACL will retain its separate corporate identity.

Section 11321. In considering the consolidation of a rail carrier and a water carrier, the Commission is required to determine if the two carriers compete. If we find that they do compete, we must determine whether the consolidation will still allow competition without reduction on the water route in question and will still allow the water carrier to be operated in the public interest advantageously to interstate commerce. We conclude that CSX and ACL do compete because they serve common points and solicit the same traffic.

We have analyzed the possible anticompetitive effects of the transaction on the barge industry and conclude that, due to the highly competitive nature of the barge industry and the relative ease of entry associated with it, no reduction in competition will occur. We also conclude that ACL will continue to operate in the public interest advantageously to interstate commerce. We are imposing oversight and reporting conditions to allow the Commission to review periodically the effects of the transaction on competition.

Section 11344. In considering a consolidation application of this type, the Commission is primarily required to consider the competitive impacts. We conclude that the transaction will not result in a substantial lessening of competition in freight surface transportation in any region of the United States. Possible anticompetitive effects on the transportation of coal and agricultural commodities have been analyzed, and no adverse impacts have been found. In addition, public benefits will result from a combination of CSX and ACL. These benefits generally consist of improved efficiency and service options resulting from the creation of an integrated, intermodal system.

Labor Issues. Railroad employees of CSX will be protected by the standard labor conditions for railroad consolidations. No other labor protection conditions will be imposed.

Energy and Environment. The transaction presents no energy conservation or significant environmental impact problems. Thus, we are imposing no energy or environmental conditions.

No need has been shown for any other conditions proposed by any party. Therefore, all requests for relief, other than those discussed above, are denied.

B. Procedural and Preliminary Matters.

1. *Procedural Objections.* During the proceedings, WTA raised several procedural objections. These objections have been renewed on brief.[2] In various interlocutory decisions, all of WTA's petitions alleging procedural errors were denied. WTA's brief raises no new arguments regarding the procedures followed in the disposition of this proceeding. Therefore, we will deny WTA's requests for relief on these matters for the reasons set forth in our prior decisions.[3]

In our various interlocutory decisions, we noted the applicability of the time frames of 49 U.S.C. 11345(c). The procedural schedule in this case was designed to comply with statutorily-mandated deadlines. During the proceeding, the Administra-

[2] WTA's objections, as summarized in its post hearing brief, WTA 216, volume II, include: (1) failure to initiate a rulemaking proceeding to promulgate regulations governing railroad-water carrier consolidations; (2) waiver of information required under the railroad consolidation regulations and acceptance of an incomplete application; (3) designation of this transaction as "significant", rather than "major", under 49 U.S.C. 11344(d); (4) waiver of an initial decision by the Administrative Law Judge; (5) setting a procedural schedule not permitting a full and fair hearing; (6) failure to disqualify Commissioner Gradison from participating in the proceeding; and (7) failure to address adequately environmental and energy issues.

[3] Decision No. 5, served November 15, 1983; Decision No. 6, served December 2, 1983; Decision No. 12, served January 27, 1984; and Decision on Motion to Disqualify, served February 10, 1984.

tive Law Judge took into consideration numerous requests to extend or modify the procedural schedule. Where necessary and appropriate, extensions of time were granted. As a result of the flexibility in scheduling, a full and fair hearing was held while conforming as closely as possible to the statutory deadlines. In view of the full hearing and the substantial record developed, we find no merit in WTA's allegation that the procedures for hearing this case did not provide for an adequate hearing.[4]

2. *ACBL Tariff Exemption.* In No. 39599, *American Commercial Barge Line Company—Petition for Exemption from Tariff Filing Requirements* (not printed), served January 19, 1984, we exempted ACBL from contract carrier tariff filing requirements, thereby placing its contract services on an equal footing with those of rail and motor carriers. We recognized the pendency of the CSX control application, but concluded that the present voting trust arrangement obviated any need to incorporate intermodal competition issues in the January 1984 exemption decision. Instead, we conditioned the exemption on a requirement that ACBL resubmit its exemption request within 30 days if control is authorized, so that issues related to intermodal competition and possible revocation of the exemption could then be addressed. We need not further consider the exemption in the present proceeding. ACBL will be expected, however, to resubmit its exemption request within 30 days of the consummation of CSX's acquisition of control.

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[4] WTA notes in its post hearing brief, WTA-215, page II-33: "In all, Verified Statements by over 200 witnesses were filed and 54 appeared to give oral testimony. The evidentiary record exceeds 15,000 pages, including testimony by no less than 14 economists, and detailed traffic and financial data submitted by numerous carriers, shippers and various government agencies."

II. NATURE AND SCOPE OF THE APPLICATION

CSX proposes to acquire control of ACL and its water carrier subsidiary, ACBL. CSX has acquired ACL's corporate parent, TGR, and placed the ACL stock in an independent voting trust. At present, CSX and its carrier subsidiaries have no officers or directors in common with ACL or its carrier subsidiary ACBL. If the Commission approves control, the voting trust will be dissolved when the Commission's decision becomes effective and ACL will become a wholly-owned subsidiary of CSX. No further cash transactions or securities issuances or exchanges are planned.

CSX is a non-carrier holding company[5] with subsidiaries engaged in railroad operations, real estate and land development, energy and natural resource development, and motor carrier operations.[6] Its gross revenue for 1982 was $4,908,600,000 and net income was $338,400,000. Based on revenues, the principal commodities handled by CSX's rail subsidiaries in 1982, were coal, paper, phosphates, chemicals, and grain.

---

[5] Rail carrier subsidiaries of CSX include: the Chesapeake and Ohio Railway Company (C&O) and its subsidiaries the Baltimore & Ohio Railroad (B&O), Akron and Barberton Belt Railroad Company, Baltimore and Ohio Chicago Terminal Railroad Company, Staten Island Railroad Corporation, Monongahela Railway Company, Terminal Railroad Association of St. Louis, Belt Railway Company of Chicago, Chicago South Shore and South Bend Railroad, Nicholas, Fayette and Greenbrier Railroad Company, Norfolk and Portsmouth Belt Railroad Company, and the Toledo Terminal Railroad Company; the Seaboard System Railroad, Inc. (SBD) and its subsidiaries Atlanta and West Point Railroad Company, Carrollton Railroad Company, Chicago and Western Indiana Railroad Company, Clinchfield Railroad Company, Columbia, Newberry and Laurens Railroad Company, Gainesville Midland Railroad Company, Glasgow Railway Company, Paducah and Illinois Railroad Company, Western Railway of Alabama, Winston-Salem Southbound Railway Company, and the High Point, Thomasville and Denton Railroad Company; and the Richmond, Fredericksburg, and Potomac Railroad Company.

[6] Motor carrier subsidiaries of CSX include Chessie Motor Express, Inc. (CMX) and Seacoast Transportation Company.

CSX's rail subsidiaries operate 27,000 route miles in the District of Columbia and the 21 States of: Alabama, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia.

ACL's also a non-carrier holding company with subsidiaries engaged in water carrier operations,[7] boat building, and marine terminal operations.[8] Its gross revenue for 1982 was $295,000,000 and net income was $21,000,000. Based on revenues, the principal commodities handled by ACBL in 1982 were coal, grain, and liquids such as chemicals and food oils.

ACBL operates on approximately 7,500 miles of inland water ways. Operations are conducted on the following rivers: Ohio River and all navigable tributaries between Pittsburgh, PA, and the Mississippi River; Illinois River; Upper Mississippi River from Minneapolis, MN, to Cairo, IL; Lower Mississippi River, from Cairo to New Orleans, LA; the Gulf Intracoastal Waterway from Florida to Brownsville, TX; Tennessee River; Cumberland River; Warrior River; Alabama River; and Missouri River (rarely). These rivers serve portions of the following States: Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, West Virginia, and Wisconsin. ACBL and the CSX rail subsidiaries can interchange traffic at numerous points along the above-listed waterways. The consolidated companies propose to offer an integrated, single-system transportation service over the 29 State area that will be jointly served by CSX and ACBL.

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[7] American Commercial Barge Line Company.

[8] ACL's major non-carrier subsidiaries include: Jeffboat Incorporated, a major inland shipbuilding company; Louisiana Dock Company, Inc., a marine services, maintenance, and repair company; and American Commercial Terminals Inc., a cargo transfer and storage company.

III. OPERATING PLAN

The applicants have submitted a detailed post-approval operating plan. They anticipate that most of the operational changes described in the plan will commence during the first year after the consolidation is approved. Applicants seek to take advantage of opportunities to operate more efficiently and to provide improved service.

Operating improvements and changes were proposed in existing patterns of service for coal, grain, phosphate/potash, and chemical traffic. Also discussed were changes to ACL's Louisville, KY, coal terminal; development of a new transloading facility along the Tennessee River; and the creation of a new Thru-Bulk Service facility. These changes are discussed below.

A. New Service.

1. *Coal.* Applicants anticipate that the combined company will be able to compete in coal markets where neither company now competes effectively. These new marketing opportunities include the extension of the market for eastern Kentucky coal to Texas and Upper Midwest utility customers, to compete with western coal. Applicants foresee coal moving from mines on SBD's lines in the eastern Kentucky coal fields to Louisville (or other terminals on the Ohio River) to be loaded into ACBL barges. The barges would travel via Cairo, IL, or New Orleans, LA, to such possible destinations as Houston or Corpus Christi, TX, or destinations on the Upper Mississippi River in Minnesota and Wisconsin. Applicants also foresee an increase in the tonnage of western Kentucky coal being exported via New Orleans or moved to utilities in the Upper Mississippi River. This coal could be carried by SBD to Mt. Vernon, IN, then transferred to covered barges moving north to Minneapolis and St. Paul, MN. This traffic would reduce empty backhaul mileage for ACBL covered barges moving grain from Minnesota to New Orleans for export.

2. *Grain.* Applicants contend that consolidation would permit new, intermodal movements of grain. They argue that at present there is little exchange between rail and barge on grain movements because of a lack of coordination.

Applicants note that CSX and ACBL now serve distinctly different markets. With consolidation, new service could be offered to grain producers in Iowa, Indiana, and Ohio by opening the Gulf export market to shippers that presently either lack access to river terminals or the necessary volumes to move grain in unit trains. New domestic markets could also be explored.

In the export market, the transaction would allow CSX to act as a gatherer bringing grain to the river. CSX's greater gathering range, as compared to trucks presently being used, will permit more shippers to send their grain to the river for export, thus broadening the grain producers' marketing options. CSX would have a new incentive to pursue these movements on a regular basis in conjunction with ACBL, because close coordination will permit important efficiencies for improved equipment use, quicker turnarounds, and increased volumes.

In the domestic markets, applicants argue that a large market now exists in the Southeastern United States for grain grown in the Midwest to be used as feed for poultry and livestock. Most of this grain currently moves all-rail. The proposed consolidation offers the prospect of intermodal moves as substitutes for this all-rail service to areas like Florida and Georgia. An example is grain moving from a Midwest point, *e.g.* Terre Haute, IN, by rail to Evansville, IN, for transfer to barge; barge down the Ohio and Tennessee Rivers to a transloading point, *e.g.* Decatur, AL, where it would be reloaded on rail cars for shipment to consumption points. This type of movement could reduce costs by 40 to 60 cents per ton as compared to an all-rail movement.

3. *Phosphates/Potash.* The applicants are considering the initiation of two new rail-barge movements of phosphates. First, ACBL is exploring the acquisition of an ocean-going tug/barge to transport phosphate rock from the Bone Valley in Florida to fertilizer producers on the Lower Mississippi River or Texas Gulf Coast. Approximately 700,000 to 900,000 tons would be involved in this movement. This proposed movement would improve the east-west balance of CSX-ACBL traffic in conjunction with the proposed new grain movements from the Mississippi River to Florida.

Second, applicants propose to transport phosphatic chemicals from the Bone Valley by unit train to an interchange point along the Tennessee River, such as Decatur. This traffic, expected to be approximately 400,000 to 500,000 tons a year, would be transloaded to ACBL barges for movement to points along the Mississippi and Illinois Rivers in the Midwest.

Applicants also expect to offer a new transportation option for shipping Canadian potash to the Southeast. The potash currently moves in all-rail service. The new service would transport potash by rail from Canada to St. Paul, by barge to a Tennessee River transloading point, and then by rail to final delivery. They expect that about 180,000 to 235,000 tons of potash could be accommodated by the new service. These proposed southward movements would also partially balance the proposed northbound phosphatic chemical movement.

4. *Chemicals.* Applicants propose to penetrate new markets in the Northeast by promoting the rail-barge transportation of chemicals from points on the Texas-Louisiana Gulf Coast, such as Houston, Galveston, and Port Arthur, TX. The traffic would move by barge via the Gulf Intracoastal Waterway and the Mississippi and Ohio Rivers for transloading into rail cars at Ohio River ports such as Cincinnati, OH. The chemicals would be transloaded at Philadelphia, PA, into trucks (owned by CMX) for delivery. Much of this traffic currently moves all-water. Construction of a new rail-truck terminal in Philadelphia would be required for this service to be instituted.

B. TERMINAL CHANGES.

1. *ACL's Louisville Terminal.* Applicants could make substantial changes at the Louisville terminal if the new coal markets they propose develop as projected. The Louisville terminal currently can handle 3 million tons of coal a year by operating two shifts a day. By making the physical changes discussed below, the terminal's capacity could be increased to approximately 3.5 million tons, while still operating only two shifts. Joint ownership will allow continuous communication between the barges and the railroad, resulting in better coordination and substantial savings. This would substantially reduce the turnaround time of rail cars to approximately 24 hours, and eliminate at least 5 hours of work by a switch crew of 4 employees per day.

If consolidation is approved, and the coal volumes justify it, CSX proposes to construct a new lead track to by-pass the current lead track entering the ACL terminal. This would eliminate a 14-degree curve immediately adjacent to the terminal that limits deliveries to 40-car blocks instead of the more efficient 80-car blocks. Elimination of the curve would, therefore, end the need to break larger trains down into 40-car blocks before entering the terminal.

In addition, CSX proposes to build a loop track at the terminal to allow an 80-car train to be run through the ACL bottom dumper without uncoupling. This would minimize time required to unload the trains. The estimated cost of construction of the new lead track and loop track is approximately $920,000, with an estimated annual savings to the consolidated companies from more efficient operation of $1,530,000.

2. *New Transloading Facility.* Applicants are considering the development of a new transloading facility along the Tennessee River for use in the phosphate/potash interchanges previously described and also, for the interchange of rail-barge grain shipments. Decatur, AL, is a possible location because an existing CSX facility could be expanded to handle the expected traffic.

CSX's Tennessee River facility at Decatur has two 15-car tracks that run perpendicular to the river and two other parallel tracks of equal length that are used to load another barge line. CSX could acquire adjacent property and construct three more tracks of equal length. For the phosphate traffic, applicants would use a bottom dumper to unload and a conveyor to move the phosphate to the barge slip. Unloading grain and potash would be accomplished by a 5-yard clam shell crane to be located at the site. The cost of these improvements at the terminal would be approximately $1,950,000 and could be completed within the first year after consolidation.

3. *Thru-Bulk Facility.* At the CSX Snyder Avenue Yard in Philadelphia, CSX intends to construct a new facility to transload chemicals and plastic pellets to CMX trucks for delivery to destinations in the Northeast. The facility would contain sufficient equipment to handle the expected volumes of liquid and dry bulk commodities. Existing tracks would be relocated and new tracks and switches added. A new fleet of trucks would have to be acquired at an estimated cost of $350,000. The new facility would cost approximately $1.1 million and require at least 3 months to construct and place in service.

C. Other Changes and Benefits.

1. *Joint Purchasing.* Applicants state that control of ACL by CSX will afford the applicants opportunities to realize savings through joint purchasing, particularly of steel products. Both ACL and CSX are large purchasers of steel plate; ACL for the production of barges and CSX for production of rail cars. CSX uses approximately 40,000 tons of plate and structural steel a year. ACL, in recent years, has purchased annual amounts of between 30,000 and 185,000 tons of steel plate. By combining orders applicants estimate that they could save $2 million annually through volume discounts.

2. *Communications.* CSX owns and operates a modern microwave network for internal communications to which ACL would have access upon consolidation. Adequate capacity exists to handle ACL's communication traffic at no additional cost once the initial connection costs are incurred. ACL would also be able to reduce its internal communication costs by approximately $300,000 per year.

CSX may also assist ACL in the construction of a modern inland waterways communication system. An ACL subsidiary, Waterways Communication System, Inc. (WATERCOM), has been licensed by the Federal Communication Commission to construct and operate such a system. Applicants propose that WATERCOM would handle radiotelegraph service to vessels and allow vessel operators to originate direct-dial calls onto the land-based telephone network. There are a number of TGR properties that could be used for the location of WATERCOM facilities. Applicants estimate that WATERCOM could save $900,000 in land acquisition, site preparation, and construction costs by using the availabe TGR sites.

3. *Coordinated Information System.* Applicants also represent that the control of ACL by CSX would allow ACL to take advantage of CSX's sophisticated data processing service. ACL's data processing services are presently provided internally by a staff with an annual budget of $1.7 million. Applicants argue that ACL would realize substantial savings in purchasing new computer hardware and software by combining its purchasing with that of CSX. Savings of 25-50 percent are typically obtained by volume purchasing. Furthermore, ACL would gain access to CSX's large and highly skilled technical staff and to CSX's extensive library of software.

Finally, ACL would be able to use CSX's training and educational facility in Jacksonville, FL. CSX has contracted for a number of training programs at a discount rate that ACL would have available for its use. While these benefits are not generally quantifiable, the parties expect substantial savings as a result of ACL's access to CSX's information services.

IV. POSITIONS OF THE PARTIES

A. GENERAL. A number of United States Congressmen, the United States Departments of Transportation and Agriculture, State transportation departments, and other public entities have participated in the proceeding. Water carriers and public utilities have participated actively because they foresee being substantially affected by the proposed transaction. Numerous shippers have participated, both supporting and opposing the application.

B. PARTIES IN SUPPORT.

1. *Applicants.* Applicants contend that this transaction will result in the availability of an integrated, single-system transportation service over the entire 29-State area currently served by CSX and ACL. They argue that creation of this integrated rail-barge operation will enhance transportation competition by offering more efficient service to the shipping public. Applicants contend that the new combined CSX-ACL will offer additional transportation options to shippers and permit them to arrange their total transportation packages through a single organization.

Applicants assert that control by CSX of ACL offers a number of important advantages. They contend that a common control will: (1) make possible operating efficiencies, through coordination, that will help reduce the total costs of transportation services; (2) allow intermodal services to be priced at more optimal levels and on a joint-rate basis, predicated on costs and demand for the entire through service; and (3) make new marketing opportunities available to shippers, particularly new markets for commodities such as coal, grain, and chemicals.

Applicants contend that the proposed transaction is not prohibited by the Panama Canal Act because the CSX railroads and ACBL do not compete. They argue that there are very few, if any, common points of service between ACBL and CSX.

They assert that this lack of competition is due mainly to the relative cost advantages of barges that allows barges to offer rates that railroads generally cannot meet.

Further, applicants argue that, even if they do compete, the transaction will not reduce the level of competition and, therefore, is permissible under section 11321(b). They represent that no one entity, not even a combined CSX-ACL, could exploit customers, lessen competition, or create a monopoly. They assert that entry into the barge industry is relatively easy. Thus, CSX-ACBL would have neither the incentive nor the ability to engage in predatory practices in an effort to gain monopoly power. In sum, applicants contend that the consolidation will increase competition, offer more efficient service, possibly lower transportation costs, and result in no adverse competitive effects of any kind.

2. *United States Department of Transportation (DOT).* DOT, an active participant, recommends approval of the application. It contends that competition will not be reduced as a direct result of the acquisition. DOT argues that CSX and ACL will have an enhanced ability to coordinate their operations and marketing, allowing them to offer the shipping public an improved intermodal service. DOT argues that intermodal ownership is consistent with the National Transportation Policy and, therefore, the consolidation is in the public interest.

3. *State and Local Governments.* A number of State and local governments filed letters or comments in support of the application. These include: Alabama, Georgia, Florida, Indiana, Illinois, (Office of the Governor and Department of Transportation), Louisiana, New York, South Carolina, Tennessee, Texas, Virginia, Mayor of the City of Louisville, KY, Mayor of the City of Decatur, AL, and the Maryland Port Administration.

Indiana, Illinois, and Georgia support the transaction because they believe it will increase competition for grain produced in those States by offering cheaper transportation result-

ing in an over-all lower price for the grain. They contend that new intermodal service, with its resulting efficiencies, will open new markets for their grain producers.

Alabama, New York, and Tennessee assert that consolidation of available barge and rail service under one corporate structure will benefit shippers in their States who now find it difficult to coordinate separate rail and barge transportation. They argue that "one-stop shopping" will provide efficient transportation of the many raw materials, finished products, and agricultural products moving in and out of their States.

Florida, Texas, South Carolina, and the City of Decatur support the application, and represent that intermodal shipping options will increase competition, resulting in the development of new markets and more efficient movements to existing markets. They are particularly enthusiastic about proposed new chemical and phosphate movements to and from their States.

Finally, Texas, the Maryland Port Administration, the City of Louisville, and others support the application, because they forecast that the combined CSX-ACBL system will offer new domestic and export coal markets.

4. *Shippers.* A number of verified statements by shippers[9] were included as part of the application. These shippers produce and ship a wide variety of commodities including: glass containers, clay, automobiles, fertilizer, feed, plywood, chemicals, and coal. They support the application because a single-system service would result in lower transportation costs. In addition, linking the CSX railroads to the waterways would

[9] American Colloid Company, Anchor Glass Container Corporation, Dundee Cement Company, Englehard Corporation, GAF Corporation, General Motors Corporation, Georgia Poultry Federation, Great Southern Paper, H.C. Spinks Clay Company, Land O'Lakes, Incorporated, Leckie Fuel, Incorporated, Mobay Chemical Corporation, Northwestern Steel and Wire Company, Reading and Bates Coal Company, South/East Coal Company, Summer's Fuel Incorporated, and UNIMIN Corporation.

permit coordinated, efficient, intermodal service throughout most of the eastern United States. They argue that coordination is difficult today, causing shipping delays and higher costs.

In addition to the shippers filing verified statements, a large number of shippers filed letters supporting the application. These shippers also argue that the "one-stop shopping" that will be possible if this transaction is approved will lower transportation costs and increase the efficiency of the transportation system.

C. Parties in Opposition.

1. *United States Department of Agriculture (USDA).* USDA, an active participant, recommends that the Commission deny the proposed transaction. USDA contends that the transaction has the potential to cause a substantial reduction in competition, would result in no legitimate public benefits but rather would produce net public costs, and could have major anticompetitive consequences on the transportation of grain and other agricultural products.

2. *States and Local Governments.* A number of State governments submitted verified statements in opposition, with the sponsors subject to cross-examination.

West Virginia is concerned that the consolidation would decrease coal shippers' transportation options. It argues that this would ultimately increase shipper costs while providing no meaningful benefits that could not be achieved without joint ownership. West Virginia is concerned that the consolidation will reduce competition between railroads and barge lines, and within the barge industry.

Minnesota fears that shippers along CSX lines will lose their option of selecting from competing water carriers, because CSX will have the ability to tie its traffic to ACBL. Minnesota is also concerned that a rail-barge consolidated entity could engage in predatory pricing without effective regulatory restraints.

Several other States filed comments in opposition, including Kentucky, Oklahoma, and the Illinois Department of Agriculture. These States fear, generally, that the transaction could result in monopolistic practices that would be detrimental to the competitive structure of the transportation industry. They are concerned that CSX may serve ACL terminals to the exclusion and detriment of public facilities. In addition, they argue that, if this application is approved, other similar transactions will occur and will result in the eventual domination of the barge industry by the railroads.

3. *Water Transport Association (WTA).* The WTA[10] opposes the application. WTA contends that the consolidation would violate the Panama Canal Act (49 U.S.C. 11321) and is contrary to the public interest. WTA argues that CSX and ACBL compete on a daily basis, with overlapping routes between major cities and ports along the inland waterways, and often bid on the same traffic. It asserts that competition between CSX and ACBL will end if the transaction is approved. WTA contends, therefore, that the consolidation would significantly reduce the competitive alternatives of shippers that can now choose between ACBL and CSX.

WTA further contends that a combined CSX-ACBL would be able to manipulate its rates to divert traffic from terminals not served by ACBL to terminals that are served by ACBL. It argues that the combined entity could raise the rail portion of the rate while reducing the water portion (the so-called rate

[10] The WTA's arguments have been adopted and incorporated by reference into the comments of several other parties. These parties are: the American Waterways Operators, Inc.; a number of independent barge lines including Canal Barge Co., Inc., Crounse Corporation, Dixie Carriers, Inc., S.C. Loveland Company, M/G Transport Services, Inc., National Marine Service, Inc., The Ohio River Company, SCNO Barge Lines, Inc., and the Valley Line Company; and a number of independent waterway operators including Agri-Trans Corporation, Arkansas River Company, Brent Towing Co., Inc., Dravo Mechling Corporation, Express Marine Inc., Harbor Towing & Fleeting Inc., Hollywood Marine Inc., Park Towing Co, Inc., and Shaver Transportation Company.

scissors), thus eliminating independent barge operators who could not lower their rates to meet the ACBL rate. WTA asserts that, since many shippers are captive to CSX for originating traffic, they could be forced to use ACBL if CSX refuses to cooperate with other barge lines. This would drive independent barge lines out of business and reduce competition.

Further, WTA argues that barriers to entry will prevent new barge carriers from counteracting any abuses by combined CSX-ACBL. It argues that new entrants would not have access to the large quantity of CSX-orginated traffic and thus would be unable to develop sufficient traffic density and operating efficiency to challenge CSX-ACBL. Finally, WTA asserts that no rationally directed business would invest the necessary capital to start a new barge line knowing that CSX-ACBL could exercise the same leverage that had been used to eliminate other competing carriers.[11]

4. *National Coal Association (NCA).* NCA opposes the application.[12] NCA contends that, if approved, the consolidation would reduce competition for the transportation of coal and other bulk freight, would not be in the public interest, and would give the consolidated companies excessive, unwarranted, and inappropriate market power over movements of coal in the eastern United States.

5. *Utilities.* The Tennessee Valley Authority (TVA), operator of the largest power system in the nation and a major shipper of coal, opposes the application. TVA argues that the acquisition of ACBL by CSX will be contrary to the public interest because it will disrupt the competitive balance between railroads and barge companies. TVA contends that water carriers restrain rail rates by providing a competitive alternate

[11] Two other parties, PPG Industries, Inc. and Harvest States Cooperative, filed verified statements in opposition. Their arguments duplicate, essentially, those presented by WTA and need not be detailed here.

[12] Its members account for nearly 60 percent of the total coal tonnage produced in the United States.

source of transportation. It argues, therefore, that the consolidation of the region's dominant railroad and the largest water carrier on the inland waterways will significantly reduce this constraint on CSX's market power. TVA also contends that a combined CSX-ACBL will be able to eliminate barge competitors for CSX-originated coal by publishing single factor CSX-ACBL rates while publishing higher rail rates for use in combination with other barge lines that now compete with ACBL.

Tampa Electric Company (TEC)[13] contends that a combined CSX-ACBL could price its service so as to eliminate competing barge lines, without cost to the combined entity, by apportioning the joint rail-barge rate to undercut all competing barge lines while maintaining the same overall rate. TEC argues that this would substantially reduce competition and would eventually raise rates, because new entrants would not appear since investors could not be sure that CSX-ACBL would not eliminate them as it had earlier competitors.

6. *Shippers.* A number of shippers submitted letters in opposition. Generally these letters express a fear that shippers will become captive to a combined CSX-ACBL and lose one of the transportation options they now enjoy. They argue that this will result in a serious lessening of competition.

7. *United Transportation Union (UTU).* The UTU opposes the application. It has requested, however, that if the proposal is approved, labor portective conditions be imposed for the benefit of all affected railroad employees.

D. Neutral Parties.

1. *United States Department of Energy (DOE).* DOE participated but maintained a neutral position. It recognized that, while there are a number of positive aspects to the proposal (including possible increased trarnsportation efficiency), there are also negative aspects, such as the possible increase in the transportation cost for coal.

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[13] TEC was joined in its opposition by Gatliff Coal Company and TECO Transport & Trade Corporation.

2. *State and Local Governments.* Although Mississippi did not file a verified statement, it did file a comment. Mississippi notes that the transaction would encourage intermodal shipments that might result in lower transportation costs. It also notes that serious questions have been raised about the negative aspects of the merger on competition.

3. *United States Department of Justice (DOJ).* DOJ filed a letter stating that it did not intend to file comments or participate in this proceeding. It did file a post-hearing brief endorsing the Commission's proposed analysis.

V. DISCUSSION AND CONCLUSIONS

A. STATUTORY CRITERIA. The statutory criteria of 49 U.S.C. 11321 and 11344 govern our consideration of the control application. Further, other statutes, including the antitrust laws, provide guidance in our evaluation under the statutory criteria. As set forth in the following discussion of specific statutory criteria, our main concern is the protection of the public interest through the preservation of competitive transportation markets and of adequate transportation to the public.

1. *The Panama Canal Act - 49 U.S.C. 11321.* Section 11321 was originally enacted as section 11 of the Panama Canal Act, Pub. L. No. 62-337, 37 Stat. 560, 566 (1912). This section was enacted to bar railroad-owned ships from operating through the Panama Canal and undermining water carrier competition with transcontinental railroads. As enacted, section 11 also included limitations on railroad ownership of competing water carriers. The legislative history of section 11 clearly shows that Congress intended that these statutory limitations should be used only to prohibit those rail-water combinations which could be expected to have an adverse effect on competition. *See Water Transport Assn.-Petition for Declaratory Order*, 367 I.C.C. 559 (1983), for a more complete examination of the legislative history of section 11.

At the time of the enactment of the Panama Canal Act, the railroads were, by far, the dominant mode handling intercity freight traffic. Water carrier service provided the only effective alternative to the railroads in many instances. Thus, Congress was greatly concerned that railroad ownership of water carriers was stifling potential competition for intercity freight traffic and depriving the shipping public of competitive alternatives. *See* H. R. Rept. 423, 62d Cong., 2d sess. 12 (1912).

Since 1912, the barge industry and the surface transportation industry generally have changed dramatically. At that time, barges handled only a minute part of all intercity freight. As of 1912, traffic on the Mississippi and Ohio Rivers equaled less than one percent of the tonnage handled by the railroads in the United States. Further, barge industry operations were relatively primitive. Tow boats mostly used steam power and barges were generally made of wood. Tows often consisted of only one or two barges (the average barge carried about 250 tons of freight).

Today, railroads handle only about 36 percent of intercity freight tonnage (down from about 90 percent in 1912) and inland river barges now handle about 13 percent of that traffic (up from about 1 percent in 1912). Diesel towboats now handle tows of as many as 30 to 45 barges and barges now often can carry 1,600 tons of cargo. Thus, the barge industry has developed into an efficient, effective competitor for intercity freight traffic.

Further, changes have occurred in the overall structure of transportation regulation since 1912. At the time of the enactment of the Panama Canal Act, the government fostered a policy of modal separation. Although railroad ownership of barges was not strictly prohibited at any time, regulatory philosophy in the early part of this century disfavored such intermodal ownership. This approach carried over to railroad-motor carrier regulation after the motor carrier industry became prominent in the 1930s and was made subject to this

Commission's jurisdiction. In recent years, more emphasis has been given to intermodal coordination in regulatory policy. *See, e.g.*, 49 U.S.C. 10101(a)(5). We have given railroads greater freedom in acquiring motor carriers and motor carrier operating authority. Ex Parte No. 438, *Acquisition of Motor Carriers by Railroads* (to be printed at 1 I.C.C.2d____), served July 20, 1984, and *Motor Carrier Operating Authority-Railroads*, 132 M.C.C. 978 (1982). We will examine transactions proposing rail-barge affiliations under the standards of the Panama Canal Act consistent with these evolving policies of increased competition and intermodalism.

The provisions of 49 U.S.C. 11321(a)(1) prohibit a railroad from owning, operating, controlling, or having an interest in a water carrier or vessel operating on a water route with which it does or may compete for traffic. However, pursuant to 49 U.S.C. 11321(b), the Commission may authorize a rail carrier to own, operate, control, or have an interest in a water carrier or vessel, not operated through the Panama Canal, if the proposed interrelationship with the water carrier will still allow the water carrier or vessel to be operated in the public interest advantageously to interstate commerce and will still allow competition, without reduction, on the water route in question.

Our analysis under section 11321, therefore, must begin with a determination of whether CSX and ACL do, or may, compete for traffic. The Commission has used a two part test to determine whether the rail and water carriers compete. This test consists of determining (1) whether the railroad and water carrier serve two or more common points, and (2) whether they actively compete for the same traffic or, except for the common ownership, would actively compete for the same traffic between such common points. *Southern Ry. Co. Section 5(15) Application*, 342 I.C.C. 416 (1972), *aff'd sub nom. American Waterway Operators, Inc.* v. *United States*, 386 F.Supp. 779 (D.D.C. 1974), *aff'd sub nom. Water Transport*

Ass'n v. *United States*, 421 U.S. 1006 (1975).[14] In *Southern Ry.*, the Commission rejected arguments that it should in its evaluation of the competition issue, give consideration to the broader markets that would be relevant in an antitrust proceeding. See Appendix C, particularly Applicants' arguments.

The application of this test to the facts of a particular proceeding depends upon the meaning of common service point. The meaning of "common service point" is not precise and fixed, but must be determined within the context of the particular facts and circumstances of each case. Prior decisions, however, provide guidance regarding the proper analytical framework.

It is not necessary that a point be served directly by both carriers to come within the meaning of "common service point." The Commission has found that a carrier, by participating in through rates, serves a point beyond its line and may compete with another carrier operating to that point. *S.P. Co. Ownership of Oil Steamers*, 34 I.C.C. 77, 80 (1915), *See also Southern Ry. Co. Section 5(15) Application*, 342 I.C.C. 416 (1972). Thus, a railroad serves any point reached by its lines or reac' ed by lines of connecting carriers. Further, this principle supports a conclusion that water carriers serve points within a reasonable distance of waterway terminals to the extent that other carriers provide gathering service to the water terminal. For example, a water carrier serves a coal mine if the mine is located on the waterway or if the mine has available to it economically feasible transportation service to docks on nearby waterways. In *Southern Ry.*, the Commission found that the railroad and water carrier did not compete because the railroad did not serve the new coal mines that would be the sole customers of the water carrier. The water carrier, however, could not serve those mines directly either. The shipper would provide private carriage from the origin point of the movement to the water. The coal would move from the mines to the

[14] At the time these cases were decided, 49 U.S.C. 11321(a)(1), 11321(a)(2) and 11321(b) were, respectively, codified at 49 U.S.C. 5(14), 5(15), and 5(16).

docks by private rail shuttle service and by conveyor. At least one of the moves from mine to dock would be about 5½ miles long. For purposes of applying section 11321(a), however, we see no reason to distinguish the *Southern Ry.* situation from a situation where a shipper uses for-hire carriage to move its commodities to the docks. Limiting the meaning of origin point to waterside points where the traffic either originates or is delivered by the shipper would produce a strained and inappropriate reading of section 11321(a). Defining a point served by a carrier as including inland points with existing or potential connection to that carrier is consistent with *Decision No. 3* in this proceeding. In *Decision No. 3*, we requested traffic lane data for origin-destination pairs served by ACBL by interlining with another carrier (other than CSX) in competition with CSX. *Decision No. 3*, Appendix A, II. 1.d.

The definition of the geographic scope of an origin or destination point also depends upon the facts and circumstances of the particular proceeding. In *Southern Ry.*, the Commission construed the origin point relatively narrowly because the water carrier proposed to perform contract carrier operations serving specified facilities of a single shipper. It was further noted in *Southern Ry.* that, in a different factual situation, a railroad and its affiliated water carrier need not serve identical places and facilities in common, or even the same customers, before finding competition to exist within the meaning of section 11321(a). 342 I.C.C. at 435. Thus, origin and destination points, for purposes of deciding a particular case, must take into account the relevant markets for the commodities shipped. A point is not defined by narrow, mechanical standards artificially limited to a specific dock or transloading facility. The origin and destination points include commercially feasible gathering and distribution areas along the waterways, giving consideration to the facts of a particular proceeding and the nature of the proposed operations.

The market analysis under section 11321(a) to determine whether the applicants do or may compete, however, is not as broad as an antitrust analysis. Our determination under section 11321(a) is limited, essentially, to direct competition, within the meaning of antitrust laws. The legislative history of the Panama Canal Act clearly shows that the statute was not intended to apply where the railroad is a feeder to the waterways.[15] Thus, where a railroad operates between point A and point B feeding traffic to a water carrier operating between point B and point C, the Panama Canal Act does not apply. Of course, in some circumstances, points A and C may be so close together that they might arguably be considered to be a single point. That question, however, is a matter of fact to be determined on a case-by-case basis.

The words "may compete for traffic" are construed narrowly. A finding of competition requires a showing that the railroad and water carrier actually solicit the same traffic; that but for an existing interrelationship, if any, the carriers would compete for the same traffic; or that it is probable that the carriers will compete for particular traffic in the future (absent any interrelationship). A mere possibility of competition is insufficient to support a finding of competitiveness under section 11321(a). *Southern Ry.*, 342 I.C.C. at 431. If the railroad and the water carrier do not compete, within the meaning of section 11321(a), then consolidation is not prohibited by that section, and specific approval of the transaction under section 11321(b) is not necessary.

Approval of an application under section 11321(b) requires findings that the transaction will still allow (1) the water carrier to be operated in the public interest advantageously to interstate commerce, and (2) competition, without reduction, on the water route in question.

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[15] For example, *See* 48 *Cong. Rec.* 6591 (1912), comments of Rep. Adamson, "I have no objections to their [railroads] running ships where, as the gentleman say, they are feeders, to gather up and distribute business. That is all right." Rep. Adamson sponsored the bill that was enacted as the Panama Canal Act.

The public interest test is closely related to the competition test. If the water carrier continues to operate as an active competitor, its operations will be in the public interest and advantageous to interstate commerce. This test has remained essentially unchanged since its enunciation in the earliest cases under section 11 of the Panama Canal Act (the original enactment of current section 11321). In one of the leading early cases[16] the Commission analyzed the purposes of the Panama Canal Act and discussed the meaning of "operated in the public interest":

> On a watercourse where the boats and boat lines are free from domination or control by the railroads, and where they are left to survive as their own merit or the ingenuity of their owners makes possible, there will be, and always is, a healthy rivalry and striving between such boat lines themselves and with paralleling railroads for all suitable and available traffic. There is competition. This rivalry manifests itself in several ways. The rates charged fluctuate according to economic principles, and the shipper enjoys invariably, as a result, lower charges for the transportation routed over such waterways and thereby reaps a return from the "nation's highway". Necessarily, coincident with the lowering of the rate, there is a rivalry in service which is an equally strong weapon of competition.

In *Lake Line*, the Commission went on to conclude that usually railroad ownership will have an adverse impact on a water carrier's competitive stature and, thus, on its ability to operate in the public interest. This is because the rail-controlled water carrier does not respond solely to market forces in setting rates and services, but also takes into account the interests of the railroad. Our public interest analysis, therefore, has turned on the issue of whether the natural advantages of the water carrier would be preserved, or would be affected by the

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[16] *Lake Line Applications under Panama Canal Act*, 33 I.C.C. 699, 712 (1915).

interests of the railroads. The Commission has found, in earlier cases decided under the Panama Canal Act, that usually the water carrier's natural advantages would not be preserved under rail control and has only approved applications where the railroad has shown some circumstances demonstrating that the water carrier would continue to operate in the public interest. These types of circumstances are discussed below with respect to the competition test.

In *Lake Line*, the Commission perceived the major threat to the public interest arising from rail control of competing water carriers to be the potential for predatory practices driving out competition. The Commission concluded that railroads had used their substantial resources to enable their controlled water carriers to cut water rates to an unprofitable level and drive out competition. Thereafter, water rates could be raised to the level of rail rates, thus protecting railroad profits. The existence of the controlled water carriers discouraged real competition from re-emerging because of the prospect of further rate wars. Therefore, applicants under section 11321 and its predecessors have been required to show that a realistic potential for this type of practice does not exist in order to prove that the water carrier will continue to be operated in the public interest advantageously to interstate commerce. Under the public interest test, however, improvements in operating efficiency and quality of service are also relevant.

Approval of an application under section 11321(b) also requires a finding that the transaction will allow competition, without reduction, on the water route in question. This standard is stricter than the standards for evaluating competitive impacts under 49 U.S.C. 11344(b) and (d). Under 11321(b) we not only must evaluate competitive impacts, but also must deny an application that would result in any lessening of the level of competition, regardless of whether approval of control would produce offsetting public benefits.

The section 11321(a) competitive analysis focuses on the competing rail-water routes only. Vertical connections are not always relevant to this analysis.[17] *See Southern Ry.*, 342 I.C.C. at 441. Further, monopoly on rail services for the rail portion of a *connecting* (rather than parallel) rail-water route by the acquiring railroad does not bar a transaction under section 11321. *See Southern Ry.*, 342 I.C.C. at 442.

Analysis of the competitive effects begins with identification of the relevant markets. A relevant market is the area of effective competition and has two dimensions: product and geographic. *Union Pacific-Control-Missouri Pacific; Western Pacific*, 366 I.C.C. 459, 503 (1982), (*Union Pacific*).

The "product" provided by the involved carriers is transportation. Although section 11321(b) limits our concern to the level of competition "on the water route," the competitive analysis under that section is not limited to water carrier transportation. The involved competition has many facets. Competition between the involved water carrier and the acquiring railroads, between the involved water carrier and other water carriers, and among the non-included water carriers all may effect the level of competition on the water route in question. *Illinois Central R. Co.-Control-John I. Hay Co.*, 317 I.C.C. 39, 55 (1962).

The geographic element of the market for purposes of section 11321(b) is defined in reference to the water route in question. The involved routes include the rivers connecting the commonly served points reached directly or indirectly by the applicants. We conclude that our analysis of competition on the route between the common service points should contain an analysis of the entire market for transportation services that includes traffic moving between the involved points. Although the scope of our concern under section 11321(b) is not as broad in scope as it would be under the Clayton Act, competition

[17] However, as discussed below, vertical connections are relevant to the Commission's analysis of the transaction under section 11321(b) to the extent they have an effect on competition.

takes place in markets and no economically meaningful analysis can be done regarding competition on a particular route without considering effective competitive alternatives to service over the route. In recent consolidation decisions, the Commission has recognized the importance of competitive analysis of the type performed under the Clayton Act and has accorded great, though not controlling importance to this analysis. *See Union Pacific*, 366 I.C.C. at 501-06.

In the past, the Commission had frequently denied applications under section 11321(b) where the involved railroads and water carriers were direct competitors on the routes in question. Where such direct competition had been shown to exist, the Commission often concluded that it could not find that competition would continue without reduction unless applicants had shown some extraordinary circumstances. The Commission however, in four types of circumstances approved the acquisition or retention of a railroad interest in a water carrier that competes over a parallel route. First, the Commission has often approved unopposed applications because the lack of opposition indicated that the proposal would not be harmful to competition or to the public interest.[18] Second, the Commission has approved an application where it has found a high level of existing competition that would not likely be reduced by a proposed rail-water transaction. See e.g., *Steamer Lines Norfolk to Baltimore and Other Points*, 41 I.C.C. 285, 294 (1916). Although *Steamer Lines* involved an application to retain ownership of boats acquired before passage of the Panama Canal Act, its rationale is applicable to proceedings involving acquisition of a water carrier. Third, the Commission has approved transactions where a railroad would acquire a non-controlling interest in a competing water carrier when such interest would be insufficient to enable the railroad to

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[18] *See Peninsular & O.S.S. Co.*, 204 I.C.C. 142 (1934); *Direct Navigation Co.*, 46 I.C.C. 378 (1917); *S.P. Steamboats on Sacramento River*, 34 I.C.C. 648 (1915); and *O.W.R.R. & N. Co. Ownership of Steamboats*, 33 I.C.C. 658 (1914).

influence the competitive position of the water carrier. Fourth, the Commission has approved applications where the evidence has shown that the level of competition between the involved railroad and water carrier over the route in question was minimal and, thus, the transaction could not have a substantial anticompetitive impact.

The application in this proceeding is for approval of control of ACBL and the application is vigorously opposed. Therefore, the first and third circumstances set forth in the preceeding paragraph are not present here. Applicants, however, have argued that competition on the involved water routes is intense and would not be reduced by CSX acquiring control of ACBL. Further, applicants argue that competition between CSX and ACBL is minimal or non-existent on the water routes in question. Therefore, we will consider whether the proposed transaction comports with either the second or fourth of the above circumstances warranting approval of an application under section 11321.

Finally, in evaluating whether competition will be reduced, we note that preservation of competition in a particular transportation market is not synonymous with the preservation of the position of each competitor. Some lessening of the acquired water carrier's competitive position or the competitive position of other individual water carriers should not require denial of an application if the level of competition over the involved route is not diminished. We must consider whether market forces would preserve the level of competition on the water route generally even though the competitive relationship between the railroad, the acquired water carrier, and other water carriers would be altered. Harm to competitors does not imply harm to competition. Consequently, the holding in *John I. Hay*, to the extent inconsistent with this decision, that a finding of no reduction of competition of the involved water route requires a supporting conclusion that the involved water carrier's competitive status in relation to other carriers (includ-

ing the acquiring railroad) would compare favorably with its competitive status as an independent carrier, is rejected and will no longer be followed.

2. *49 U.S.C. 11343-11344(d).* Under 49 U.S.C. 11343, a railroad and a water carrier subject to the Commission's jurisdiction must obtain Commission approval to consolidate.[19] The criteria for apporval of a carrier consolidation application are set forth in 49 U.S.C. 11344. Before the enactment of the Staggers Rail Act of 1980[20] (Staggers Act), section 11344 provided one set of general standards for all carrier consolidations, subject to additional requirements for rail-motor consolidations. The Staggers Act modified the general standards slightly and limited their applicability to proceedings involving the consolidation of at least two class I railroads. 49 U.S.C. 11344(b)(1). The Staggers Act provided a new standard applicable to all other carrier consolidations. This new provision[21] requires the Commission to approve an application unless it finds that (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States, and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

Because the Staggers Act relates to railroad regulation, some question arose as to whether non-railroad consolidations are subject to paragraph (b) or (d) of section 11344. Preliminarily, the Commission concluded that paragraph (b) should continue to apply to non-rail consolidations. *See* Notice of Proposed Policy Statement in Ex Parte No. 55 (Sub-No. 53), *Motor Carrier Consolidation Procedures, General Policy Statement* (not

[19] As previously noted, ACBL holds water carrier operating authority issued by the Commission. If ACBL performed only exempt operations, then the transaction would only be subject to 49 U.S.C. 11321.

[20] Pub. L. No. 96-448, 94 Stat. 1895 (1980).

[21] 49 U.S.C. 11344(d).

printed), served October 19, 1981. Upon further consideration, and in view of the enactment of the Bus Act,[22] the Commission ultimately concluded that the standards of 49 U.S.C. 11344(b)(1) now apply only to consolidations of two or more class I railroads. *Motor Carrier Consolidation Procedures*, 127 M.C.C. 798, (1982).

Although CSX controls more than two class I railroads, the proposed transaction would not have any effect on the control of the railroads. Rather, the transaction involves control of a water carrier by a corporation at present controlling certain railroads. Therefore, the section 11343-4 application is governed by the criteria of 11344(d) and the relevant criteria of 11344(c).[23]

In our competitive analysis of the proposed CSX-ACL transaction we will apply the standards of section 11321 in combination with those of section 11344(d). Under section 11344(d), we examine (1) the impact on competition on a corridor-specific basis, (2) the impact on source competition at common points, (3) the vertical foreclosure impacts at common points, and (4) the conglomerate competitive impacts. Our analysis under section 11321 includes the first and second of these four types of competitive impacts. The third and fourth types of competitive impacts have relevance to the section 11321 analysis only if they would cause competitive impacts on the water routes in question. Because the section 11321 standard for approval is stricter than that of section 11344, horizontal impacts including source competition, are evaluated under the former section of the Act. The other two types of competitive impacts are evaluated under section 11344(d). Thus, *any* reduction in the level of competition over the affected water routes bars the

[22] Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261.

[23] The second, third, and fifth sentences of section 11344(c) apply. These authorize the Commission to impose conditions, require a public interest analysis of any guaranty or assumption of fixed charges (although none is present in this transaction) and authorize the requirement of inclusion of other railroads.

transaction regardless of any offsetting public benefits that might be realized. With respect to the other types of competition, however, the transaction is barred only if (1) it would result in a *substantial* lessening of competition, and (2) the anticompetitive effects outweigh the public benefits.

3. *49 U.S.C. 11347.* The provisions of 49 U.S.C. 11347 require the Commission to impose conditions for the protection of adversely affected carrier employees when approving a transaction under section 11344. Under this requirement, railroad employees who are adversely affected by a consolidation are entitled to the protective conditions specified in *New York Dock Ry.-Control-Brooklyn Eastern District*, 360 I.C.C. 60 (1979) (*New York Dock* conditions). Section 11347 applies when "a rail carrier is involved in a transaction." It is not limited to transactions involving the control of two or more railroads. Therefore, the transaction, if approved, must be subject to conditions at least as protective as the *New York Dock* conditions for the benefit of any affected CSX railroad employees. We reject applicants' argument that a rail carrier is not involved in this transaction. Although CSX is a railroad holding company, not a railroad, the CSX-controlled railroads are involved in the transaction.

Approval of the transaction does not necessarily require the imposition of conditions for the benefit of water carrier employees. Although section 11347 requires protection of "the interest of employees," without specific limitation to railroad employees, that section is the recodification[24] of former section 5(2)(f), which specified that conditions be imposed "to protect the interests of railroad employees". Section 11347, therefore, requires protective conditions only for the benefit of affected railroad employees, not for the benefit of all affected carrier employees.[25]

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[24] The Interstate Commerce Act was recodified without substantive change by Pub. L. No. 95-473, 92 Stat. 1439 (1978).

[25] *See Burlington Northern, Inc.-Control & Merger-St. L.*, 360 I.C.C. 784, 946-50 (1980), aff'd *sub nom. Missouri-Kansas-Texas R.R. Co. v. United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied* 451 U.S. 1017 (1981).

In past decisions approving rail-water consolidations, the Commission has interpreted former section 5(2)(f) as applying only to railroad employees, but has considered the interests of other carrier employees under the public interest criteria applicable to consolidations and has concluded that it had discretionary authority to impose conditions for the benefit of those employees. *See Federal Barge Lines, Inc., Purchase*, 285 I.C.C. 439, 447 (1953); *Baltimore Steam Packet Co. Acquisition and Control*, 244 I.C.C. 583, 603-4 (1941). The Commission based this analysis on the former generally applicable consolidation criteria that required consideration of the interest of carrier employees affected by the proposed transaction. Under those criteria, therefore, the Commission had an obligation to consider the impact of a transaction on water carrier employees.

As previously discussed, the former general criteria for considering consolidation proposals now apply only to consolidation of two or more class I railroads. The CSX-ACL application is governed by 49 U.S.C. 11344(d), which does not require consideration of employee interests. Therefore, *Federal Barge Lines* and *Baltimore Steam Packet*, to the extent they find that the Commission must at least consider the interests of water carrier employees, lack continuing precedential value. Inasmuch as no group of employees other than railroad employees has sought the imposition of protective conditions we need not decide whether we have jurisdiction to impose reasonable conditions for the benefit of water carrier employees under present law.

4. *Antitrust Considerations.* The Commission considers the policies embodied in the antitrust laws in our analysis. *See Union Pacific*, 366 I.C.C. at 485 and cases cited there. We do not, however, sit as an antitrust court determining whether a proposed transaction would be in compliance with the antitrust laws. Rather, we consider the criteria of the governing statutes and include consideration of relevant antitrust policies. We are empowered, however, to disapprove consolidations

that would not violate the antitrust laws and to approve consolidations even if they would otherwise violate the antitrust laws.[26] *United States* v. *I.C.C.*, 396 U.S. 491, 511-13 (1970).

5. *Special Findings.* The governing statutes require that we make certain special findings with respect to the proposed transactions. Under section 11321 we must determine whether CSX and ACBL compete. If they do not compete, then the transaction is not subject to the restrictions of section 11321 and no other findings need be made under that section.[27] If the railroad and water carrier compete, then the application must be denied unless we find the transaction will still (1) allow the water carrier to be operated in the public interest advantageously to interstate commerce and (2) allow competition, without reduction on the water route in question. Section 11344(d) requires us to approve the transaction (if it is not otherwise barred by section 11321) unless we find that (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly or restraint of trade in surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. Section 11344(c) requires, in some circumstances, findings regarding fixed charges and inclusion of other railroads. Those findings, however, are not pertinent to the proposed transaction.

6. *Environment and Energy Factors.* We must also consider environmental and energy factors in our evaluation of the proposed transaction. The National Environmental Policy Act of 1969,[28] requires us to consider the effects of the trans-

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[26] Under 49 U.S.C. 11341(a), our approval of a carrier consolidation exempts the transaction from application of the antitrust laws.

[27] The Commission in the past, however, has gone on to analyze and approve applications under the predecessor of section 11321(b) even though it has found that the railroad and water carrier do not compete under section 11321(a). *See e.g. Southern Ry. Co. Section 5(15) Application*, 342 I.C.C. 416 (1972); *Chicago, M., St. P. P.R. Co. Control*, 312 I.C.C. 553 (1961).

[28] 42 U.S.C. 4321 *et seq.*, *See* 49 C.F.R. 1105.

action on the environment. We must consider the transaction's effect on the conservation of energy resources, as required by the Energy Policy and Conservation Act.[29]

B. COMPETITION. The competitive impact of the proposed transaction is a major factor in our consideration of the application under the criteria of 49 U.S.C. 11321(b) and 11344(d). Further, we consider competitive impacts and are guided by the policies of the antitrust laws because under most conditions strong competition promotes efficiency and, thus, is in the public interest. *See Union Pacific*, 366 I.C.C. at 501-503.

Although we are not bound by the antitrust laws, the principles of those laws provide substantial assistance in our assessment of the proposed consolidation. In applying the criteria of the relevant sections of the Interstate Commerce Act, we have considered the economic analytical framework applicable in analyzing a proposed acquisition under the antitrust laws. Thus, in analyzing competitive impacts on markets, our primary concern is not the impact on individual competitors. Rather, our focus is on whether the level of competition, measured with respect to prices and quality of service would be reduced by the transaction. An increase in market concentration is one factor indicating that competition might be reduced as a result of a transaction. Increased market concentration, however, is not dispositive of the competition issue. A consolidation is not anticompetitive unless it would create or enhance market power. Market power is defined as the ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time. Sellers with market power also may eliminate rivalry on variables other than price. *See* United States Department of Justice, Merger Guidelines, issued June 14, 1984, 49 Fed. Reg. 26823, June 29, 1984.

In our competitive analysis, we will consider whether the proposed transaction would create or enhance the ability of

[29] 42 U.S.C. 6201 *et seq.*, *See* 49 C.F.R. 1106.

CSX and ACBL to maintain rates above competitive levels, or to reduce or eliminate non-price competition, in the relevant transportation markets.

1. *Market Definition.* The first step in analyzing a proposed consolidation is to define the relevant markets likely to be affected. A relevant market is the area of effective competition and has two dimensions: product and geographic. The relevant markets must be defined in terms of commercial reality. *See Union Pacific,* 366 I.C.C. at 503. As discussed *supra* in the Statutory Criteria section, we examine competition on the water route in question, under 49 U.S.C. 11321(b), with respect to the markets for transportation services embracing the involved routes.

Under the DOJ merger guidelines, a market is defined as a group of products and a geographic area such that a hypothetical firm that is the only present and future seller of those products in that area would be able to profitably impose a small but significant and nontransitory price increase. If such an increase is not profitable because a sufficient number of purchasers switch to other products, to products in other areas, or to other firms that begin selling the particular product, then these additional firms are considered part of the market.

a. *Product Market.* The product sold by for-hire water carriers is freight transportation. In defining the relevant product market we must decide whether private barge firms or other modes of freight transportation should be included in the market. We also must consider whether the transportation of different major commodity groups constitute separate markets or economically significant submarkets.

In *Decision No. 3,* we noted that the competitive analysis under section 11321(b) is many faceted. Therefore, we solicited evidence regarding all modes of transportation competing with ACBL. The evidence shows that other modes, primarily the railroads, compete with water carriers for some traffic. The record in this proceeding, however, shows that these other modes are imperfect substitutes for water carrier service.

Railroads and barges compete in three ways. First, there is some direct competition for traffic movements between commonly served origin-destination points. This type of direct point-to-point competition is somewhat limited in practice because barge line-haul costs are lower than rail costs. For example, one recent study showed that for barge movements of coal down the Mississippi from St. Louis to the Gulf [a river segment where barge operations are most efficient because of large tow sizes] barge line haul rates were less than one-fourth of corresponding railroad rates, Corps of Engineers, *Comprehensive Master Plan for the Management of the Upper Mississippi River System*, Technical Report A-Navigation and Transportation (1982). Several other studies confirm that in virtually all river segments barge line-haul rates and costs are significantly lower than comparable rail rates and costs.

Because of this cost difference, most traffic that originates within a certain distance, or band, around navigable waterways and that has the option of moving by barge or rail, does move by barge. The width of the band depends on specific conditions. For example, studies have found a 25-mile band for Illinois Basin coal, Finance Docket No. 26310, *Southern Railway Company Section 5(15) Application*, 342 I.C.C. 416 (1972), and a much wider band (up to 200 miles) for export grain, Carl J. Liba, "Definition of the Inland Waterways Hinterland," *Transportation Research Forum Proceedings* (1982). Applying the DOJ market test here, if all barge lines operated as a single firm then those barge rates could profitably be raised a small but significant amount, since only some traffic at the boundary of the band would be lost to railroads.

The second way for barges and railroads to compete is in serving the same destination from different origins. The most common example is a waterside utility capable of receiving coal by barge from mines near water or by rail from inland mines. There are 95 utility plants located on the Nation's waterways that can or do receive coal by barge.

Barges and railroads also compete in an indirect and more limited way for some shipments of products from different origins to different destinations where those products compete in end-use markets. Again, railroads are not an effective constraint on small increases in barge rates for these movements.

Thus, on the evidence here, we will focus on water carrier transportation as the relevant product market. Competition from other modes will be given limited consideration to the extent that the record shows intermodal competition to be substantially effective in disciplining barge rates "on the water routes in question."

In addition to considering possible intermodal competition, we must also consider the scope of intramodal competition within the barge industry. We conclude that the market includes private water carriers as well as common and contract carriers.[30] We further conclude, as discussed below and in Appendix C-1, that the barge market is not economically segmented by commodity group.

Many of the larger barge firms are engaged primarily in private or exempt carriage and are owned or controlled by shippers. Unlike railroads, private barge firms have a line-haul cost structure similar to for-hire barge firms. And unlike railroads, private barge firms can reach the same shipping and receiving points as for-hire firms. These private carriers have greatly expanded their operations in recent years. Many or most of these private fleets not only transport their own goods, but also compete for other traffic when they have surplus equipment. Several firms have received contract and common carrier authority and effectively compete for regulated as well as exempt commodities.

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[30] Our competitive analysis should include private carriers because 49 U.S.C. 11321 is concerned with the effect of a transaction on competition on the water route. This competitive analysis is not limited to common carriers. Further, as the Panama Canal Act applies to private and contract carriers as well as to common carriers, *see S.P. Co. Ownership of the Schooner Pasadena*, 33 I.C.C. 476, 477-78 (1915), private carriers should be included in our competitive analysis.

Altogether these shipper firms own over 5,000 barges, about one-third of the fleet operating on the Mississippi River System (MRS) and the Gulf Intracoastal Waterway (GIW). They act to discipline market price and service levels. They take advantage of profitable opportunities by offering themselves as for-hire carriers or by offering towboats and barges for lease or charter. They haul substantial amounts of freight in private carriage that otherwise could move by for-hire carriage. Therefore, they effectively discipline prices of for-hire carriage and we will include them in our market analyses.

The transportation of different major commodity groups should not be treated as separate markets. Water carrier equipment is reasonably interchangeable in its ability to handle various commodities. Because of the importance of coal and agricultural commodities in the traffic bases of the applicants, we will look at those movements separately and determine whether the transaction would have any adverse impacts on the transportation of those commodities. Our analysis, however, indicates that the transportation of those commodities is embraced within the general water carrier freight transportation market.

b. *Geographic Market.* As discussed in the Statutory Criteria section, we analyze competition with respect to the geographic markets that embrace the involved water routes. Further, as we have analyzed in Appendix C-1, we conclude that water carrier equipment can move and operate reasonably freely throughout most of the MRS and GIW waterway systems. Carriers have sufficient mobility to discipline barge price and service levels effectively in diverse sections of the MRS and GIW systems. Therefore, the water carrier freight transportation market should not be broken into geographically segmented markets consisting of particular stretches of rivers or waterways.

2. *Section 11321(a).* The threshold question in any Panama Canal Act analysis is whether the rail carrier does or may compete for traffic with the water carrier in question. 49 U.S.C. 11321(a)(1). If the two carriers do not compete, the Panama Canal Act prohibitions do not apply and no further inquiry under section 11321 is necessary.[31] In applying section 11321(a), the Commission has traditionally applied a two part test. First, the rail carrier and water carrier must serve two or more common points. Second, the two carriers must actually compete for the same traffic.

As discussed previously, we have concluded that the meaning of "points" is determined with respect to the particular facts and circumstances of each case. We have concluded that "point" can not rationally be defined as a specific dock or waterside facility. Rather, "point" includes the commercially feasible gathering and distribution areas along the waterway. As such, an analysis of whether carriers serve common points must take into account the relevant market for the commodities shipped.

We have defined the market, for the purposes of section 11321(a), as those situations in which CSX and ACL appear to draw traffic from the same geographic areas to reach the same shippers or receiving areas. There is an area around the inland waterways within which traffic that can move by water, most likely does move by water. This has been described as the "barge hinterland." However, at the boundary of this "hinterland" there is direct rail-barge competition. The boundary is set by the relative rail and barge rates at any given time, and changes in those rates reflect the existence of direct rail-barge competition for commodities moving at the periphery. At this boundary or periphery, neither rail nor barge has a clear cost advantage and, therefore, are genuine competitive alternatives.

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[31] Although not required, the Commission has previously gone on to examine the transaction under section 11321(b) regardless of the finding under 11321(a). See cases cited, footnote 28, *supra*.

The evidence demonstrates that CSX serves customers whose traffic moves from the periphery to the river. The evidence also shows that ACBL is present as an active competitor for this traffic moving from the borders of the gathering area surrounding the MRS and GIW. Clearly, CSX and ACBL do serve two or more common points within the meaning of section 11321(a).

However, even under a more narrow definition of "common points," including only those cases where CSX and ACBL both actively serve the same waterside points for both the origin and destination of traffic, we still conclude that CSX and ACBL serve two or more common points. In 1983, there were 163 locations common to CSX and ACBL. Thirty utility plants can receive both rail and water service that could involve ACBL and CSX. Further, in 1981, there were 31 cities on the river commonly served by CSX and ACBL.

The second step in our analysis of section 11321(a) is to determine whether CSX and ACBL compete for the same traffic. We must find that either the two carriers actually solicit the same traffic or that there is a probability that they will compete for particular traffic at some time in the future.

There are specific concrete examples in the record to demonstrate that CSX and ACBL have actively and competitively sought the same traffic of specific shippers. For example, TVA stated that both CSX and ACBL submitted bids to supply TVA's Cumberland, TN, plant while the Cumberland plant was still under construction.[32] TVA originally considered splitting the traffic between CSX and ACBL, which had submitted the two best bids, but eventually awarded it all to ACBL. A second example is K.A. Steel Chemicals, Inc. It switches between CSX and ACBL for the movement of its muriatic

[32] In order to serve the plant, CSX needed to construct a rail line approximately 20 miles long while ACBL need to build a conveyor belt approximately 11 miles long. Even though neither CSX nor ACBL could serve the plant directly when the bids were submitted they were competing for this traffic through the bidding process.

acid between Lemont, IL, and Muscatine, IN. It stated that its decision is often based on the availability of ACBL tank barges and CSX tank cars at any given time. These examples prove that CSX and ACBL do actively compete for the same traffic for the same shippers.

Further, as discussed previously, along the border of the barge hinterland, CSX is in direct competition with barges generally. Since ACBL is capable of serving almost any point along the inland waterways and receives traffic from the barge hinterland, there is a real possibility that CSX and ACBL do compete for the same traffic. What is true of competition between CSX and barge lines generally must be true for CSX and ACBL specifically.

Accordingly, having found that CSX and ACBL serve two or more common points and actively compete for the same traffic, we find that applicants do compete within the meaning of section 11321(a).

3. *Section 11321(b).* Following a finding that the two carriers do compete within the meaning of section 11321(a), the Commission must consider the application in light of the criteria of section 11321(b). This section allows the Commission to approve an acquisition if (1) the water carrier is not operated through the Panama Canal; and (2), if (A) the acquisition will still allow competition without reduction on the water route in question, and (B) it will still allow the water carrier to be operated in the public interest advantageously to interstate commerce. Each of these criteria will be discussed in turn.

a. *Panama Canal Operations.* The record demonstrates that ACBL does not now and never has operated through the Panama Canal. Prior to the beginning of this proceeding, ACBL requested the Commission to revoke the operating authority that authorized operations for regulated commodities through the Canal. This request was granted and all of ACBL's operating authority through the Canal was revoked on

August 30, 1983. WC-552, *American Commerical Barge Line Company* (not printed), decided August 30, 1983.

ACBL currently owns no equipment that would allow it to transport exempt commodities through the Canal and, while it might acquire ocean-going equipment in connection with its planned phosphate move from Florida to Texas, no indication has been given that this equipment would be used through the Canal for exempt commodities. In addition, the Panama Canal Act is an absolute prohibition against railroads owning competing barge lines that operate through the Canal, regardless of whether the commodities are regulated or exempt. Therefore, upon approval of the acquisition, ACBL is absolutely barred from operating through the Panama Canal in the future, regardless of the commodities involved. Such operations would constitute a *per se* violation of section 11321.

b. *Competition Without Reduction.*

i. *General.* To determine if the proposed consolidation will allow competition without reduction on the water route in question, we must examine the barge market as it exists today and then analyze how it might be transformed by this transaction. The focus of the analysis is the possible effect of the acquisition on the level of competition rather than the effect on individual competitors. The purpose of the Panama Canal Act is to promote competition in order to protect shippers from actions that result in non-competitive prices for transportation services, not to protect individual barge carriers.[33]

We begin by looking at the entire barge industry. As has been noted by both applicants and some opponents, the record amply demonstrates that the barge industry today is highly competitive.

There are literally hundreds of firms handling traffic on the MRS-GIW. In 1981, there were 199 operators that handled

[33] 48 *Cong. Rec.* 6,591 (1912).

over 250,000 tons of cargo each on the MRS-GIW. Taking into account known corporate affiliations, there were 169 carriers handling over 267,000 tons of cargo in 1981.

Having noted the large number of carriers holding themselves out to provide transportation within the barge industry, we have examined the concentration within that industry. Concentration is one indicator of the degree of competition within an industry or market. When production or industry output is not concentrated in a few firms, there is general agreement that competition will dominate the determination of price and service levels, absent certain outside forces such as government regulation. Likewise, if a market is highly concentrated, a consolidation that reduces the number of competitors by one could reduce the level of competition. However, increased concentration or market share is not alone dispositive of whether a proposed consolidation reduces competition. The competitive strength of existing carriers, the opportunities for new carriers to enter the market, the existence of alternate modes or routes of transportation, and alternate sources of supply may offset increased market share.

Information on concentration within the barge industry has been presented in terms of individual and cumulative market share, Herfindahl-Hirschman Indices, and four and eight firm ratios for tonnage, revenues, horsepower, and ownership of barges. In analyzing these indices of market concentration, we must first determine which carriers are to be considered part of the market.

While there are perhaps as many as 1,000 barge companies in existence, many are small companies with only a few barges or towboats that operate only within harbors or on very limited river segments. These firms are not actually competing for line-haul barge traffic. Firms owning 100 barges or more operate within the line-haul industry and most certainly compete with one another for traffic. At least 33 carriers own 100 or more barges. In addition, there are some smaller firms that do, or

may, engage in line-haul operations in direct competition with larger firms. Therefore, any analysis must consider both larger firms and the smaller firms that actually compete for line-haul traffic.

We conclude that private carriers should also be included in our analysis of concentration in the barge industry. Although many of the existing barge firms owned or controlled by shippers or receivers are engaged primarily in private carriage for their parent firms, many transport not only their own goods but compete for exempt commodities when they have a surplus of equipment. In addition, many private carriers have received common and contract carrier operating authority from this Commission to move regulated commodities, such as paper or steel. Altogether, these "private" firms own about one-third of the total barge fleet operating on the MRS-GIW. They offer themselves as for-hire carriers and haul substantial amounts of freight in private carriage that otherwise could move by for-hire carriage. Accordingly, we will include them in our market concentration analysis.

As discussed in the Market Definition section, industry concentration should not generally be analyzed in terms of discrete river segments or commodity groups. With minor exceptions, both barges and towboats are relatively free to travel anywhere on the inland waterway system. Further, while modifications to equipment are sometimes required to allow a change from one commodity to another, these changes can be and are frequently made. Thus, the barge industry need not be segmented into numerous submarkets for analysis. However, since coal and agricultural commodities are the most important components of both CSX's and ACBL's traffic bases, we separately discuss the impact of the consolidation on these commodities in later sections of this decision.

Having identified those carriers to be included in an analysis of market concentration, we find that there are low concentration levels in the barge industry today. Table 1 indicates that

no single firm carries more than 7 percent of industry tonnage and no two firms carry more than 14 percent. The top four firms together carried only 20.72 percent of industry tonnage. This table includes private carriers. It does not fully adjust for corporate affiliations among barge firms, and so understates somewhat the degree of concentration. For example, in Table 5 four firm and eight firm concentration ratios increased by 3.2 percent and 4.8 percent respectively when adjusted to account for affiliated barge firms. However, the table still represents a highly unconcentrated industry.

TABLE 1

TONNAGE MOVED BY BARGE OPERATIONS ON MRS-GIW SYSTEM, 1981

Operator Number	Tons (1,000's)	Percent of Total	Cumulative Percent
1	30,229	6.90	6.90
2	28,631	6.54	13.44
3	16,641	3.80	17.23
4	15,271	3.49	20.72
5	8,534	1.95	22.67
6	7,660	1.75	24.42
7	7,517	1.72	26.13
8	7,136	1.63	27.76
9	7,066	1.61	29.37
10	7,046	1.61	30.98
11	6,765	1.54	32.53
12	6,644	1.52	34.04
13	6,454	1.47	35.52
14	6,343	1.45	36.96
15	5,983	1.37	38.33
16	5,939	1.36	39.69
17	5,223	1.19	40.88
18	5,044	1.15	42.03
19	4,882	1.11	43.14
20	4,768	1.09	44.23
21	4,714	1.08	45.31
22	4,704	1.07	46.38
23	4,538	1.04	47.42
24 - 50	79,767	18.24	65.65
51 - 100	78,753	17.98	83.63
101 - 149*	37,723	8.61	92.24
151 - 199	18,708	4.30	96.54
All Other**	15,308	3.49	100.00

* Data for Operator Number 150 is omitted in original.

** The number of operators smaller than the 199th is not disclosed.

Note: Percentages do not add to 100.00 due to rounding.

Source: Submitted by Barber (Figure 2, Rebuttal, CSX-71), and derived from DOT-5 (Walsh), Appendix D. Original source is U.S. Army Corps of Engineers, domestic Waterborne Commerce computer tapes as processed by the Department of Transportation.

Table 2 also demonstrates the tonnage concentration data for the MRS-GIW system and is derived from the Commission's 1979 W-1 reports, the most recent year that those reports were filed. This table does not include private carriers engaged in hauling exempt traffic, since they did not file W-1 reports, although their cumulative tonnage was included as a component of the tonnage used to percentage shares in Table 1. Again, the data show an industry with very low concentration. The top four for-hire carriers (including ACBL, number 2) accounted for only 13.83 percent of the total tonnage, and the ten largest for-hire firms reported here moved less than 20 percent of the traffic.

Like Table 1, this table does not fully reflect all corporate affiliations among barge firms, leading to a slight understatement in the degree of industry concentration. The omission of private barge firms from the list of companies and the inclusion of private barge tonnage in the industry total further understates concentration somewhat, since several of the larger firms are private carriers. This last point also explains why Table 2 shows less industry concentration than Table 1.

TABLE 2

SHARE OF MRS-GIW SYSTEM TONNAGE ACCOUNTED FOR BY CLASS A AND OTHER FOR-HIRE BARGE COMPANIES, 1979

Company	Tons	Percent	Cumulative Percent
The Ohio River Company	24,054,857	5.15	5.15
American Commerical	22,229,717	4.76	9.91
Valley Line Company	10,193,788	2.18	12.09
Union Mechling	8,117,050	1.74	13.83
Federal Barge Lines	7,377,130	1.58	15.41
Ingram Corporation	6,290,526	1.35	16.76
Igert	4,827,269	1.03	17.79
SCNO Barge Line	4,251,952	.91	18.70
Flowers Transportation	3,969,680	.85	19.55
Arrow Transportation	1,684,796	.36	19.91
Ohio Barge Line	1,194,543	.26	20.17
Warrior & Gulf	471,678	.10	20.27
All Others	372,741,362	79.75	100.00
Total	467,741,362	100.00	

Source: Submitted by Barber (Figure 8, CSX-21), and derived from ICC, *Transport Statistics in the United States*, Part 5; Corps of Engineers, *Waterborne Commerce*, Part 2.

Table 3 presents 1981 percentage tonnage data in 3 carrier groups, including private barge lines. It shows an approximate Herfindahl-Hirschman Index of 172. This index is used by the Department of Justice to evaluate pre- and post-merger concentrations in industries. *See* DOJ Merger Guidelines, section 3.1. An index value of less than 1,000 shows an industry with little concentration, and by direct implication, an industry that is strongly competitive. Again, fully adjusting for barge firm affiliations would slightly increase the degree of industry concentration shown in Table 3, but does not detract from the table reflecting a highly unconcentrated industry.

TABLE 3

BARGE CARRIER TRAFFIC SHARES ON THE MRS-GIW SYSTEM, 1981
(PER CENT OF UNDUPLICATED TONNAGE AGGREGATED IN THREE-CARRIER GROUPS)

	1981	
Carriers	3-Carrier Share	Cumulative Share
3 Largest	17.4	17.4
4th-6th	7.2	24.6
7th-9th	5.0	29.6
10th-12th	4.7	34.3
13th-15th	4.3	38.6
16th-18th	3.7	42.3
19th-21st	3.3	45.6
22nd-24th	3.0	48.6
25th-27th	2.6	51.2
28th-30th	2.3	53.5
31st-33rd	2.1	55.6
34th-36th	2.0	57.6
37th-39th	2.0	59.6
40th-42nd	1.9	61.6
43rd-45th	1.7	63.2
46th-48th	1.7	64.9
49th-51st	1.6	66.5
52nd-54th	1.5	68.0
55th-57th	1.4	69.4
58th-60th	1.4	70.8
61st-63rd	1.3	72.1
64th-66th	1.2	73.3
67th-69th	1.2	74.5
70th-72nd	1.1	75.6
73rd-75th	1.1	76.7
76th-78th	1.0	77.7

79th-81st	1.0	78.7
82nd-84th	0.9	79.6
85th-87th	0.9	80.5
88th-90th	0.9	81.4
91st-93rd	0.8	82.2
94th-96th	0.8	83.0
97th-99th	0.8	83.8
All Others*	16.2	100.0

Approximate Herfindahl-Hirschman Index 172

* There were 267 smaller operators in 1981.

Source: Submitted by Barber (Appendix Table A, Rebuttal, CSX-71) and derived from disaggregated data presented to applicants by U.S. Army Corps of Engineers.

Tonnage carried is one measure that can be used to measure industry concentration. Other useful measures of industry concentration are the relative numbers of barges operated by the larger firms and the percentages of towboat power owned.

Table 4 presents data on ownership of jumbo size hopper barges capable of hauling dry bulk commodities. This table includes both private and for-hire carriers and can, therefore, be most appropriately compared with Tables 1 and 3. Concentration by barge ownership appears to be greater than concentration by tonnage. However, this is due in large part to the grouping together, in Table 4, of affiliated barge firms. The data still reveals a relatively unconcentrated industry. Calculation of a Herfindahl-Hirschman Index based on Table 4 would show an index of under 400, well under the 1,000 threshold used by the Departmant of Justice.

TABLE 4

TOP TEN FIRMS' FLEETS OF JUMBO SIZED HOPPER BARGES CAPABLE OF HAULING DRY BULK COMMODITIES, 1982

Company (including affiliates)	No. of Barges	Percentages of Total Barges	Cumulative Percent
ORCO/Orgulf	1,805	9.2	9.2
ACBL	1,530	7.8	17.0
Valley/Security/ Flowers/Mo. River	1,386	7.1	24.1
Ohio Barge/WGN	825	4.2	28.3
Consolidated Grain	800	4.1	32.4
Dravo Mechling	658	3.4	35.8
Federal	625	3.2	39.0
ARTCO	566	2.9	41.9
Wisconsin	565	2.9	44.8
AgriTrans	505	2.6	47.4
Approximate Total Jumbo Hopper Barges in System	19,600	100.0	

Source: Submitted by Greene (Appendix K, Rebuttal, CSX-81) and derived from surveys performed by Cargo Carriers, Inc., the barging subsidiary of Cargill, Inc.

Finally, Table 5 demonstrates industry concentration based on ownership of towboat power, taking into account affiliated carriers. The table presents two sets of concentration figures. First, consolidating data only for those barge firm affiliates with the same name and/or address; second, consolidating data for all firms deemed to be affiliated based on the evidence at hand, regardless of name or address. The second, more conservative approach, nevertheless shows an industry with low levels of concentration.

TABLE 5

DISTRIBUTION OF TOWBOAT HORSEPOWER
AMONG BARGE FIRMS, 1981-82

	Percentage Share	Percentage Share, As Adjusted For Affiliated Barge Firms
Top 4 Firms	22.1%	25.3%
Top 8 Firms	34.0	38.8
Remainder of Industry	66.0	61.2

Source: Submitted by Moses (Reply to Surrebuttal), after "correcting" (first column) and "adjusting for affiliation" (second column) his original submission (Moses, Rebuttal, CSX-72, Table 4), derived from U.S. Army Corps of Engineers' *Transportation Lines* ("Green Book")

Thus, having examined a diverse set of data from a variety of sources that can be used to examine concentration (tonnage, hopper barge ownership, towboat ownership), we can conclude that the barge industry today is not concentrated and is indeed a highly competitive industry. The next step in our analysis is to examine the effects, if any, the proposed acquisition will have on the competitiveness of the barge industry.

Theoretically, there are two ways this acquisition could adversely affect competition on the water route in question. First, by reducing the number of competitors in the market by one (eliminating ACBL as an independent competitor) thereby increasing concentration in markets where railroads and barges compete; and second, by enabling the combined CSX-ACBL to drive many or all of the existing barge operators off the water, in turn increasing the market power of CSX-ACBL and allowing it to charge supracompetitive rates. We will discuss each of these theories.

We have found that CSX, ACBL, and other barge lines compete for some traffic. However, the level of competition between them is modest due to the higher cost structure for railroads which prevents railroads from substantially disciplining barge prices For these reasons, we concluded that railroads were in a separate market. Nevertheless, because CSX and ACBL do compete in a limited way, combining them could have an effect similar to a small increase in concentration.

However, analyss of increases in concentration is only the starting point in an assessment of the impact of a consolidation on competition. An increase in concentration is not by itself dispositive of the competitive issue. In particular, a consolidation-related increase in concentration is significant only if it creates or enhances market power. This can occur if the increase in concentration reduces the number of effective competitors to a level where collusion is feasible or permits the consolidated firm to drive out competitors and increase rates above a competitive level, through, for example, use of predatory pricing. A variety of factors affect the likelihood that an increase in concentration will be translated into a reduction in competition. These include the number of firms remaining in the market after consolidation, ease of entry into the market and alternative sources of transportation and product supply.[34]

As noted previously, barge markets are not segmented into narrowly defined geographic areas and commodity groups. Instead, barge markets are broad in scope, and effective competition takes place across all river segments and commodity groups. Within this broad barge market, the consolidation will not directly lead to a reduction in the number of barge firms (since ACBL will remain an active competitor) or an increase in concentration among existing barge firms.

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[34] DOJ recognizes a number of factors that may obviate the possible harm due to an increase in concentration. While ease of entry is the most relevant to this proceeding, other factors include: changed market conditions, financial condition of firms in the market, and the presence of foreign firms. DOJ Merger Guidelines, 1984, pp. 24-29.

Opponents have alleged that there exist separate transportation markets for specific commodities (such as coal and agricultural products) moving along specific river segments, and that in these separate markets, barges and railroads actively compete for traffic. They allege that in these markets the consolidation will reduce competition through increases in concentration or by other means. We discuss these allegations in later sections on specific commodities.

As noted previously, there are hundreds of barge firms now offering line-haul service on the MRS-GIW system. Further, as demonstrated by Table 1, no one carrier, not even ACBL, transports more than seven percent of the total tonnage on the system. Thus, the consolidation of CSX and ACL will still leave hundreds of firms as active competitors. It is clear that the increase in concentration resulting from the reduction in the number of competitors, in and of itself, is insufficient to prove a reduction in competition. The number of effective competitors would remain well above the level needed to prevent abuses of market power by the newly formed CSX-ACL.

Thus, having found that the mere consolidation of ACL and CSX will not reduce the number of competitors sufficiently to create a reduction in competition on the water route in question, we must examine whether CSX-ACBL could, through some practice, eliminate a sufficient number of its competitors or engage in some other practice that would allow it to charge supracompetitive rates.

Several theories have been advanced to show how CSX-ACBL could divert traffic away from ACBL's competitors to eliminate them from the market. These theories include (1) that CSX could exert its influence as an originating carrier to divert traffic to ACBL from other barge lines; (2) that CSX-ACBL could engage in predation by lowering their joint rate below competitive levels for a sufficient period of time to eliminate all competitors and then raise their rates; and (3) that CSX-ACBL could use the "rate scissors" to manipulate their joint rates to maintain the same through rate but, by raising the

rail portion and lowering the barge portion, eliminate ACBL's competitors for CSX-originated traffic; (4) that CSX-ACBL could use a "reverse rate scissors" to manipulate their joint rates to maintain the same through rate, by lowering the rail rate and raising the barge rate to evade Commission maximum rail rate regulation; and (5) that efficiency gains from the consolidation would permit CSX-ACBL to profitably lower barge rates, eliminating ACBL's competitors and creating an "economies of scope entry barrier" that would eventually permit CSX-ACBL's rates to be raised above competitive levels. We conclude that none of these tactics could be successfully used by CSX-ACBL to reduce competition (i.e., to raise rates above competitive levels, or to reduce service levels) on the water route in question.

Opponents argue that CSX-ACBL will divert traffic from other barge lines to ACBL by exerting pressure on CSX-originating shippers, refusing to interchange traffic with independent barge lines, raising its proportional or local rates to other barge lines, or by offering poor or slow service to independent barge lines. We conclude that none of these hypothetical moves by CSX-ACBL would result in a reduction of competition.

CSX's ability, unilaterally, to divert traffic is theoretical, as shippers, not carriers, control the routing of their traffic. While a shipper might choose, because of better service and/or lower rates, to use a combined CSX-ACBL service, a shipper not wishing to use CSX rail service often has the alternative of using other modes to move its commodities to barge terminals. Once at the river, shippers are free to use the barge line, of the many available, they choose. Further, as some of the traffic currently transported by CSX to other barge lines is moving under contract, the acquisition would not affect this traffic for the life of the contract, regardless of any market power CSX or ACBL may have. Other CSX-originated rail-barge traffic moves via private barge firms, and this traffic is not likely to be diverted to ACBL unless it is in the shippers' interest to do

so. Thus, the consolidation of CSX and ACBL does not automatically mean that all CSX traffic moving to the river will be interchanged only with ACBL.

CSX does not currently have the ability to divert large amounts of tonnage from other barge lines to ACBL. For instance, in 1981, CSX delivered approximately 20 million tons of traffic to the river (18.7 million tons of coal, the rest all other commodities combined). As fully discussed in later sections, barging does not exhibit significant economies of scale. Diversion of all CSX-originated traffic to ACBL would not adversely affect the costs of competing barge firms relative to ACBL. For example, while coal and agricultural traffic is discussed more fully later, we would note here that CSX-originated coal accounts for only 13 percent of all the coal delivered to the river for onward barge movement in 1981. Regarding non-coal commodities, CSX's traffic represents approximately 0.04 percent of all non-coal commodities moved on the river in 1981.

In addition, as pointed out by applicants, there will be instances when ACBL will not represent the most efficient or cost effective barge partner for CSX, and CSX would then have the incentive to use other carriers. Just as ACBL sometimes contracts with other barge lines when it is not efficient for ACBL equipment to handle a move directly, there will be times when CSX will find it more profitable to use other barge lines. If the incremental cost of a competing barge line is lower than that of ACBL, it will be advantageous to CSX for the shipper to use the services of the more efficient competitor.

We find, based on the evidence of record, that shipper preferences, contracts, and the limited scope of CSX's participation in rail movements to the river for onward movement by barge in combination with the lack of scale economies and other entry barriers in barging (as discussed in later sections and Appendix C), will prevent CSX from diverting a sufficient amount of traffic from independent barge operators to harm competition on the water route in question.

ii. *Predatory Pricing.* Some parties have argued that a combined CSX-ACBL would lower their joint rates below the competitive levels in an attempt to drive out all of ACBL's competitors. The theory is that once all of the effective competitors are eliminated, CSX-ACBL would be free to raise rates to a supracompetitive level and reap monopoly profits. This is a classic predatory pricing scheme and is illegal under the antitrust laws. Regardless of the illegality of this type of scheme, our analysis of the evidence indicates that predatory pricing by CSX-ACBL would be unsuccessful.

The barge industry is comprised of a large number of firms, many owned or controlled by large and well-financed corporate parents. For example, U.S. Steel Corporation and Archer Daniels Midland both own large barge companies. It would not be in the best interests of these large corporate parents to sit back and allow CSX-ACBL to destroy their investments in the barge industry. Instead, they could be expected to exert pressure on CSX, both through antitrust actions and competitive responses, to forego any attempt to monopolize the market. CSX, therefore, would not be unique in terms of its size as a parent firm.

Lastly, despite arguments as to the ease with which CSX could engage in predatory pricing, there is no evidence that any of these other, well-financed corporations has attempted the actions it is claimed CSX will attempt. The same restraints that prevent anticompetitive actions by other corporate parents, will prevent these actions by CSX. The most significant of these restraints are the lack of significant scale economies and the existence of easy entry into (and exit out of) the barge industry. The existence of long term contracts, particularly for coal, strongly enforces this conclusion, since the period throughout which the predator must go at risk and incur losses is lengthened. Ease of entry adds to the probability that the predator will have to initiate the entire process over again to keep out new entrants as the contracts near expiration.

iii. *Ease of Entry.* The evidence indicates that there is sufficiently easy entry into the barge industry to provide a restraint on predatory pricing and other anticompetitive practices. If CSX-ACBL were successful in driving out its competitors and then raised its rates, new carriers would enter, or reenter, the market offering lower rates. Thus, CSX-ACBL would never be able to reap the benefits of monopoly pricing and recoup the losses sustained in whatever period of time was needed to eliminate the competition. As CSX-ACBL would be unable to recoup its losses, it would be irrational for CSX-ACBL to attempt the predatory pricing in the first place. Ease of entry is recognized by the Department of Justice as a restraint on the ability of a competitor to exercise market power to successfully raise prices for any significant period of time.[35]

There are two general types of entry into the barge industry that are pertinent to this proceeding: (1) entry by totally new firms and (2) movement of existing firms into new commodities or river segments.

(a) *New Firms.* No significant regulatory barriers to entry exist in the barge industry. Approximately 95 percent of barge traffic is exempt from regulation and, thus, carriers need not acquire operating authority from this Commission for the overwhelming majority of their traffic.[36] The small percentage of traffic subject to Commission regulation generally consists of countable items such as steel, pipe, goods on pallets, and rolls of paper. The Commission in recent years has granted broad certificates of authority to new entrants to carry goods throughout the entire inland waterway system. We therefore find no meaningful regulatory constraints on new entrants.

Another possible barrier to new entrants is the existence of scale economies or economies of density. Scale economies relate to the possible need for a new entrant to enter on a relatively large scale to achieve the same efficiencies that

[35] DOJ Merger Guidelines, 1984, pp. 27-28.

[36] 49 U.S.C. 10542.

existing firms can achieve. Economies of density relate to the need for a firm to have a well balanced flow of traffic in order to compete effectively. Economies of scale can act as an entry barrier if the optimal or efficient size of a firm is large in relation to the total demand for industry output or if the capital required for effective entry somehow puts potential entrants at a disadvantage relative to existing firms.

The record indicates that economies of scale, to the extent they exist in the barge industry, are available to carriers at a relatively low level of operation. One study (initially cited and used by opponents) shows that virtually all scale economies are attained at a level of approximately 300,000 tons carried per year. This represents approximately 200 barge loads.[37] If a carrier can obtain 5 loads per year per barge, these 200 loads could be handled in only 40 barges. The data demonstrate that a large number of operators have achieved this level of traffic. Of the 199 carriers listed on Table 1, 185 carried more than 300,000 tons.

Even more compelling is the evidence resulting from application of the "survivor principle" to barging. Rather than attempting to laboriously measure the costs of efficient barge firms at varying output levels, this analysis applies a "market test" to search for scale economies by examining the market shares of various size classes of firms over time. If certain size classes of firms enjoy true cost advantages over other size classes, than firms in the favored size classes should gain market share from other (higher cost) firms over time.

To test whether this is so, we examine the distribution of a number of barge output and input measures over time and conclude that, since larger firms have not gained market share (from smaller firms) as measured by several indices, the barge industry does not exhibit significant scale economies.

We have already used data showing concentration in a recent year among barge firms of operational towboat horsepower, tonnage carried, and hopper barge ownership. Our

[37] A jumbo hopper barge holds approximately 1,500 tons.

examination of this data showed the barge industry to be unconcentrated (and, hence, competitive). Here we present these same concentration measures over a period of time to show that larger barge firms have not been gaining market share from smaller firms.

Table 6 shows the percentage of towboat horsepower operated by the top four firms, top eight firms, and remainder of the industry from 1960 to 1981-82. The data come from the same source as our Table 5. The four and eight largest towboat horsepower operators have maintained market share over this period (at about 22 percent and 34 percent, respectively). There is no evidence here that the largest companies are more efficient than the remainder of the industry.

TABLE 6

TOWBOAT OWNERSHIP IN TERMS OF HORSEPOWER: PERCENTAGE SHARES, 1960-1982

	1960	1966	1971	1976	1981-82
Top 4 Firms	22.1	21.5	22.8	20.7	21.9
Top 8 Firms	33.1	33.8	34.1	33.4	34.0
Remainder	66.9	66.2	65.9	66.6	66.0

Source: Submitted by Stigler (Rebuttal, CSX-73, Table 1) and derived from U.S. Army Corps of Engineers' *Transportation Lines* ("Green Book"). Same original source as Table 5.

Table 7 presents data showing concentration among barge firms in tonnage carried in 1971 and 1981. The data source is the same as Table 3. While the three largest firms show a rise in cumulative tonnage (from 12.6 percent to 17.4 percent) the remaining size classes show, on average, fairly constant shares (and therefore constant returns to scale.)

TABLE 7

PERCENTAGE DISTRIBUTION OF BARGE INDUSTRY TONNAGE, 1971 AND 1981

Barge Firms	1971	1981
First 3	12.6%	17.4%
4 through 9	12.9	12.2
10 through 15	9.1	9.0
16 through 21	7.1	7.0
22 through 30	9.0	7.9
31 through 48	12.1	11.4
49 through 69	9.2	9.6
70 through 99	8.5	9.3
All other	19.5	16.2
Total	100.0	100.0

Source: Submitted by Stigler (Rebuttal, CSX-73, Table 2) and derived from data provided to applicants by U.S. Army Corps of Engineers. Same original source as Table 3.

This data can be contrasted with that presented in Table 8, that shows concentration among barge firms in ownership of jumbo hopper barges from 1973 to 1982. (The data source is the same as Table 4). The share of hopper barges owned by the largest four and next largest four barge firms declined over the period 1973 to 1982 (from 39 percent to 28 percent for the largest four, and from 17 percent to 14 percent for the next largest four) while the share of hopper barges owned by the other (smaller) firms increased from 44 percent to 58 percent.

TABLE 8

PERCENTAGE DISTRIBUTION AMONG BARGE FIRMS OF JUMBO SIZE HOPPER BARGES CAPABLE OF HAULING DRY BULK COMMODITIES, 1973-1982

Year	Percentage Share of 4 Largest Barge Firms	Percentage Share of Next 4 Barge Firms	Percentage Remainder of Industry
1973	39%	17%	44%
1977	36%	15%	49%
1982	28%	14%	58%

Source: Submitted by Stigler (Rebuttal, CSX-73, Table 4) and derived from a survey performed by Cargo Carriers, Inc., the barging subsidiary of Cargill, Inc. Same original source as Table 4.

These data strongly suggest that over a large range of (existing) firm sizes there are no efficiencies to be gained by expanding firm size, and, conversely, there are no efficiencies to be lost by a contraction in size. The persistence and continued viability of many barge lines of smaller size indicates that the smaller firms are as efficient as the largest in the barge industry. It is only in the very smallest sizes of barge lines that we see some tendency to lose market share.

Smaller carriers' success in bidding against and obtaining business sought by larger carriers also demonstrates the limited impact of economies of scale in entering the barge industry. Hunter Marine Transport Inc., and Serodino Inc., both small carriers, have obtained TVA contracts despite active bidding by large carriers. In 1979, Canal Barge Line, a carrier of liquid cargo with no dry hopper barges, successfully obtained a multimillion dollar coal contract from Commonwealth Edison, and has since obtained a large coal contract that was formerly held by ACBL. Small car-

riers have been successful in winning their share of traffic, and thus, economies of scale cannot be said to offer a significant barrier to entry.

Likewise, we do not find that economies of density offer a barrier to entry. One of the supposed advantages of density, having a backhaul rather than returning empty, is more relevant to management strategy than efficiency. The record indicates that some carriers may not always find taking a backhaul economically efficient, depending on the time needed to deliver the backhaul and the commodity to be carried. Also, dedicated service may permit efficient service without backhaul. In any case, the record shows it does not require large size to achieve significant economies of density.

The most efficient use of equipment also appears to be a management decision, with no one pattern of use required for optimal efficiency. While some large carriers own specialized barges for each commodity and different size towboats for each river system, other carriers operate efficiently with less than the optimal equipment for any given commodity or river. Further, while some carriers own many barges and large towboats, thereby needing to make fewer trips to move a given amount of tonnage, other carriers have fewer barges and smaller towboats, thereby making more trips for the same tonnage moved. Both operating systems can be efficient. The record shows that while there are at times some efficiencies in terms of tow size (depending on river segment), many smaller firms, as well as large firms, have successfully achieved these tow-size efficiencies.

Thus, scale economies and economies of density do not act as entry barriers. They simply show the relatively modest minimum size a new firm would have to contemplate if it sought successful entry into the line-haul business. There is no evidence of any significant economies of scale beyond this minimum size. Thus, any increases in ACBL's share of barge traffic (at the expense of competing firms) will not alter the existing relative costs of ACBL and its competitors.

The capital costs of starting a new firm at the levels shown to be efficient, perhaps as few as 40 barges, are high, but not

significantly different from other industries.[38] For example, entry into the airline or telecommunication industries requires an investment of several times that required by the barge industry. Entry into those industries does occur whenever profitable opportunities arise.

An active secondary market in the purchase and sale of barges and towboats serves even further to reduce barriers to entry (and exit). In this active market, buyers and sellers have a ready means of obtaining or selling equipment. Despite the depressed conditions now affecting the barge industry, caused by a drop in traffic volumes, sales do occur.[39] The over-capacity that currently exists has caused a decline in prices for equipment, permitting purchasers to acquire equipment at low cost, thus facilitating entry.

Thus, based on our analysis, we find that there are no meaningful barriers to entry for truly "new" firms. While new entrants would not be able immediately to counteract any market power created by the consolidation, they can still

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[38]Jumbo hopper barges cost approximately $225,000 new and can be ready within a few months of ordering. Covers, required to haul some commodities such as grain, cost approximately $50,000. Harbor tugs cost from $500,000 to $750,000; 1,800 horsepower towboat, $2.5 million; and a 3,800 to 5,600 horsepower towboat, $3.5 - $4.5 million. Larger towboats often used on the Lower Mississippi River cost more. Thus, investment for an initial operation of 45 barges plus towboat is estimated at approximately $16 million. Even a relatively large scale operation—100 new barges and several new towboats—could be purchased for $36 million. Such capital outlays are modest by American industrial standards.

Barge (45 x $225,000)	=	$10,125,000
Covers (23 x $50,000)	=	1,150,000
Tow (1 x $4,500,000)	=	4,500,000
		$15,775,000
Barges (100 x $225,000)	=	$22,500,000
Covers (50 x $50,000)	=	2,500,000
Tow (3 x $3,500,000)	=	10,500,000
		$35,500,000

[39] In 1982, for example, Crounse sold 31 barges, and in 1983 it sold 34 barges.

represent effective long-term and short-term restraints. As noted by DOJ (on p. 28 of 1984 Merger Guidelines), when new entry involves the dedication of long-lived assets, such as barges and tow boats, to a market, the resulting capacity and its adverse effects on the profitability of existing firms will be present in the market until these assets are economically depreciated, and this prospect can exert a significant deterrent effect on the exercise of market power by the present sellers. Attempts by CSX-ACBL to eliminate competitors and/or otherwise raise rates would encourage the formation of new carriers either independently or with shipper backing, and would benefit the public through lower, more competitive rates, and new service.

(b) *Existing Firms.* The second form of entry is the movement of existing firms (for hire or private) into new markets in response to competitive opportunities. This includes the movement of private carriers into the for-hire market. The above discussion with respect to entry and capital costs applies equally to existing firms seeking to broaden their markets.

Also, as discussed previously, shifting equipment between river systems and commodities is not difficult and thus, this form of entry will be discussed only briefly here.

Most barges are of standard size and can be used throughout the MRS-GIW system (with only a few exceptions where locks are of a non-standard size). Likewise, while towboats are somewhat less interchangeable than barges, towboats of significantly different horsepower are used by different carriers on the same river segment. Subject to the need for Commission approval of operating authority to carry regulated commodities (5 percent of total tonnage), there are no regulatory barriers to movement between rivers or river segments. With the possible exception of dry versus liquid commodities, barge equipment is also sufficiently interchangeable to allow carriers to move from carrying one com-

modity to another without the need to buy large quantities of new equipment. In most cases the only change needed in moving from one dry bulk commodity to another is the addition or removal of hatch covers used to protect some commodities from the weather. This is frequently done. For example, some carriers transport grain, with covers, in one movement and then haul coal, without covers, in a backhaul movement. In many cases, covers may be pushed to the side or stacked on deck when not needed. In addition, many liquid tank barges can be used for more than one commodity. Thus, while some barges may be specifically designed for one commodity, this is a matter of owner preference rather than necessity, and most dry cargo barges can be used on any river for any dry commodity and most tank barges can be used for any liquid commodity.

Existing firms have the ability to respond quickly to shipper demands for competitively priced service. If the consolidation led to attempts by CSX-ACBL or other barge firms to raise rates above competitive levels, these firms would not be able to reap any return for their actions since existing firms on other rivers, or handling other commodities on the same river, would immediately be able to enter the market to keep rates at a competitive level. Existing firms would have the equipment, business reputation, and the experience in the industry to act as an immediate restraint on CSX-ACBL, just as new firms offer a restraint in the long-term.

Private carriers, a subset of existing barge firms, also represent a reservoir of potential new entrants that effectively restrains any exercise of market power by CSX-ACBL. Some private carriers already haul for-hire traffic. In particular, grain companies with no private use for their barges during the winter months, often haul coal to keep the equipment from lying idle. Any attempt by CSX-ACBL to engage in any actions that raise barge rates would create the incentive for private carriers to move even further into the for-hire market.

(c) *Conclusion.* Based on the evidence of record which demonstrates the lack of significant scale economies and relative ease of entry by new firms and the ability of existing firms of all types to alter their operations in response to market conditions and opportunities, we conclude that CSX-ACBL is effectively constrained from successfully engaging in any activity that would reduce competition. This conclusion does not imply or require that every barge be substitutable for every other barge, or that every barge firm is able to offer immediate and effective competition for any commodity movement in any river segment. All that is required is that each barge operator's fleet be substitutable by the fleets (or some portion of the fleets) of potential or actual rival barge firms.

iii: *Rate Scissors*

We have already discussed opponents' arguments that the consolidation would reduce competition as a result of actions that a combined CSX-ACBL would initiate to divert CSX-originated traffic to ACBL from competing barge firms. The actions that were alleged to result from the consolidation and lead to reduced competition included CSX exerting pressure on shippers originating traffic with CSX, refusing to interchange traffic with independent barge lines, or varying service or rates to favor ACBL. We concluded that, to the extent diversion did occur, competition would not be reduced, since shippers would not face higher prices or deteriorated service levels.

Opponents also argue that CSX could costlessly divert traffic it originates to ACBL, in order to vertically foreclose ACBL's competitors from competing with ACBL for CSX-originated traffic. The theory is based on the ability of a combined CSX-ACBL to raise the rail portion of a move while lowering the water portion an equal amount, thus maintaining the same overall rate but eliminating all possible competitors for the water movement of CSX-originated traffic. This has been called the "rate scissors."

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A hypothetical case used to demonstrate this theory is as follows. A coal mine located 25-100 miles from the river is served by CSX. A utility elsewhere on the river buys coal from the mine. The movement is currently by CSX to the river terminal and then by independent barge line to the utility. If the rail rate is $5.00/ton, the terminal charge is $1.00/ton, and the competitive barge rate is $2.00/ton ($1.80 cost + .20 profit), the utility would be offered a rate of $8.00/ton ($5 + $1 + $2) pre-consolidation. Opponents contend that, post-consolidation, CSX can raise its rail portion to perhaps $5.20, while ACBL lowers its rate to $1.80. This maintains the competitive $8.00 rate and results in the same overall profit to CSX Corporation, but undercuts all other barge companies competing for CSX-originated traffic. These competing barge firms, it is argued, will eventually be driven out of business, allowing CSX-ACBL to exercise market power to raise rates above the pre-existing competitive level.

While this scenario can sound convincing on paper, we believe that market restraints would prevent it from causing harm to competition.

It is harm to competition, not harm to competitors that is our concern under the Panama Canal Act. As discussed below, we find that CSX has the interest and ability to divert to ACBL some, but not all, of the traffic it presently brings to the river. However, these expected diversions will not reduce competition.

In the first place, the rate scissors scenario *assumes* that the railroad will be able to effect a post-combination increase in the rates for the rail portion of the transportation. In reality, however, many rail rates are limited by competition on the land side or by regulation.

Furthermore, even if CSX-ACBL were successful in operating the rate scissors and temporarily eliminated some of ACBL's competitors, any attempt to raise barge rates would bring new entrants into the market. The resulting competitive pressure would check any later barge rate increases above competitive levels.

Moreover, the shippers themselves have options available to them to preclude the combined entity from raising through rates above pre-consolidation levels ($8.00 in the example).

First, many shippers have a variety of non-rail transportation options available to them, including motor, pipelines, and conveyors. Motor carriers, for instance transport 11 percent of coal moving to the MRS. In addition, conveyor belts or pipelines can be used, either to a river or to intersect with other rail carriers. Some shippers even operate their own rail lines.

Second, shippers may have alternate geographic sources of supply. Many coal mine owners own several mines and could switch to other sources if CSX-ACBL attempted to exercise market power over them. Utilities generally can buy coal from a number of mines. The existence of alternate sources gives utilities and mine owners some power over CSX. If CSX attempts to raise through rates at one mine, shippers can threaten to shift their traffic to another source, not controlled by CSX. Hence, CSX would face the loss of revenue needed to pay for the assets it uses in serving the mine.

Although, for the reasons discussed above, a rate scissors strategy would not reduce competition, CSX has the interest and ability to divert to ACBL some, but not all, of the traffic it presently hands to the river. The consolidation is not intended to maintain the existing level and structure of interchange between CSX and barge lines. CSX and ACBL expect to use their integrated rail-barge operations to compete more effectively for barge traffic.

However, even though CSX is expected to divert traffic to ACBL, the diversion is not likely to be large. In 1981, CSX delivered about 20 million tons to the rivers for onward movement by barge, and 18.7 million tons of this total was coal, representing just 13 percent of the 140 million tons of coal moving by barge on the inland waterways that year. Not all this tonnage is easily divertible to ACBL. Some was already

moving via ACBL (1.7 million tons in 1981), some was moving to a utility that elected to use its private barge fleet, and other significant tonnage was moving via long term coal contracts in conjunction with other barge lines. In terms of coal, the most important commodity brought to the river by CSX, we conclude that the most coal traffic that CSX railroads could even theoretically divert away from other barge lines to ACBL would be somewhat less than 13 percent of the total amount of coal moving on the inland waterways. And when barging is looked at as a single market, the potential diversion of CSX-originated traffic represents a much smaller percentage of total barge traffic.

The degree of traffic diversion is also likely to be small because there will be some instances when ACBL will not represent the most efficient or cost effective barge partner for CSX, where cost efficiency is measured by the true cost to CSX-ACBL. The true cost is the difference between (a) the rates charged by other barge lines and (b) the costs (including normal profits) incurred by using ACBL. Just as ACBL contracts with other barge lines when it is not efficient for ACBL equipment to handle a specific move directly, there will be instances when CSX will find it profitable to use other barge lines. In a market as competitive as barging, CSX must use the lowest cost barge connection to profitably offer the lowest possible through rate. If CSX does not, it risks losing profitable business for itself. In addition, when source rather than direct competition is involved, CSX risks losing profitable business for its shippers as well. These losses would result from receivers turning to traffic transported at lower rates by other carriers, often from other sources.

The diversion which does occur will take place not because of a rate scissors effect but because movement via ACBL is at least as efficient as via other barge lines. The combined entity has no incentive to route traffic over ACBL when it could route traffic via another barge line at a lower marginal cost to

the combined entity. Traffic diversion which takes place in order to reduce operating cost is not contrary to the public interest, especially when (as found here) the diversion will not substantially affect competition (as distinguished from particular competitors).

Furthermore, the shifts in traffic from other barge lines to ACBL will not lead to higher barge or through rates. We have shown earlier that barging does not exhibit significant economies of scale. Even diversion of all CSX-originated traffic from other barge lines to ACBL would not adversely affect the cost of competing barges relative to ACBL. These barge lines would remain effective competitors and would continue to act to discipline barge rates and service levels in a post-consolidation environment. This is so even if barge transport of coal is looked at as a separate market, as we discuss extensively, *infra*.

Thus, we conclude that the merger is likely to lead to diversion to ACBL from other carriers of some CSX-originated traffic. However, we also conclude that this diversion will not cause rates to rise above competitive levels or service to deteriorate, and will therefore not reduce competition.

As noted previously, two other theories have been advanced as possible anticompetitive actions by CSX-ACBL. They are (1) the "reverse rate scissors", and (2) diversion of traffic to ACBL due to the efficiency gained by ACBL through its consolidation with CSX. These theories are dealt with in detail in Appendix C. We note here that, based on the evidence presented, neither of these actions would be effective in reducing competition to the detriment of shippers.

Before leaving the issue of competition under section 11321(b), there is another point to be made. Opponents of the consolidation have argued that shippers captive to CSX will be subject to increased market power as a result of CSX's acquisition of ACL. A carrier that has market power over *any* segment of a movement, already has the incentive to raise rates to

the profit-maximizing level (usually the maximum reasonable rate permitted by regulation). Thus CSX does not need to have a monopoly over the entire movement (through ownership of ACBL) to exercise its market power. A carrier can only charge monopoly rates once. The market power faced by an existing shipper is not created, or increased by, consolidation of a monopoly origin carrier with a destination carrier.[40]

Therefore, based on all the evidence at hand and for the reasons discussed above, we conclude that the acquisition of ACL by CSX will still allow competition without reduction on the water route in question.

We are confident that our economic analyses and the competitive responses we have discussed are accurate and will serve as a restraint on any anticompetitive activities CSX-ACBL might attempt and will prevent a reduction in competition on the water route in question. However, we also recognize that our analyses are predictive, and that predicting the future is not an exact science. For these reasons and because this transaction is being approved under a very stringent statute, involves two of the largest carriers in their respective modes, and affects a significant portion of the country, it is particularly appropriate that we oversee this consolidation after consummation. This will enable us to study the actual competitive consequences of the consolidation and to take corrective action if adverse effects should materialize. DOT has also urged us to monitor the competitive impacts of this proposal. Regular receipt of information from and about CSX-ACBL, coupled with information from other concerned persons will greatly assist in this oversight. We discuss this condition in more detail in the Conditions section and Appendix E.

c. *Public Interest.* The third factor under section 11321(b) requires that the acquisition will still allow the water carrier "to be operated in the public interest advantageously to

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[40] *Union Pacific, supra,* at 531-539.

interstate commerce." This test is closely related to the competition test. Thus, if the water carrier continues to be an active competitor and there is not a reduction in competition on the water route in question, its operations will be in the public interest and advantageous to interstate commerce. Improvements in operating efficiency and the quality of service are also relevant.

We have concluded that acquisition of ACL by CSX will not reduce competition on the water route in question. There is also no evidence to support a finding that ACBL would be a less effective competitor on the water route after consolidation. Nor is there any evidence to suggest that CSX has any intention of taking any action to reduce ACBL's effectiveness. Neither does it appear that CSX would divert water traffic to its rail lines to support its rail operations. Indeed, it appears more likely that CSX rail traffic would be diverted to ACBL to take advantage of the greater efficiencies and lower costs of water movements. All of this points to a conclusion that ACBL will continue to operate in the public interest.

In addition, the benefits of intermodal transportation for the shipping public cannot be ignored. CSX-ACL will offer shippers a single-system option for transporting goods, eliminating the need to coordinate a number of independent modes into one movement. This ability to use "one-stop" shopping is beneficial to the public interest. Further, CSX and ACL have suggested a number of operating efficiencies, such as coordinated routing, consolidated purchasing, and joint use of some facilities (telecommunications equipment and computer facilities) that may ultimately lower costs to the shipper. Lastly, the new intermodal movements outlined in the Operating Plan (or others like them) offer shippers a new range of marketing options.

Accordingly, we find that acquisition of ACL by CSX will still allow ACL to be operated in the public interest advantageously to interstate commerce.

4. *Section 11344.* Our analysis under section 11321 found that the Panama Canal Act does not preclude the transaction. We now examine the application in light of 49 U.S.C. 11344(d) requiring an examination of possible impacts on all surface freight transportation including competition on a corridor-specific basis, source competition at common points, vertical foreclosure at common points, and conglomerate competitive effects. A transaction under 11344(d) is barred only if it would result in substantial lessening of competition *and* those anticompetitive, if any, effects outweigh the public benefits.

a. *Competitive Effects.* Section 7 of the Clayton Act was enacted "to create an effective tool for preventing all mergers having demonstrable anticompetitive effects..."[41] To identify those effects the court in *Brown Shoe* looked separately at the horizontal and vertical aspects of the proposed consolidation. Horizontal consolidations were defined to be economic arrangements between companies performing similar functions in the production or sale of comparable goods or services. *Id.* at 334. Vertical consolidations were defined to be economic arrangements between companies standing in a supplier-customer relationship. *Id.* at 323.

In the context of railroad consolidations, the Commission has analyzed competitive effects of proposed transactions in terms of parallel and end-to-end effects.[42] While these terms are roughly analogous, analysis in terms of the actual lines of railroad, *i.e.*, parallel and end-to-end, rather than the theoretical function served by those lines, *i.e.*, horizontal or vertical effects, provides a clearer approach to identifying competitive problems in rail consolidations. However, in this rail-barge consolidation proceeding, the major parties have argued their positions in terms of horizontal and vertical

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[41] *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 319 (1962).

[42] *Norfolk Southern Corp.—Control—Norfolk & W. Ry.*, 366 I.C.C. 171, 216 (1982), and *Railroad Consolidation Procedures*, 363 I.C.C. 784 (1981).

effects, and we will analyze the transaction in those terms. We will discuss specific parallel or end-to-end effects as they appear.

i. *Horizontal Effects.* While the proposed transaction is primarily vertical in nature, there are substantial horizontal aspects. These aspects must be examined closely, for they will generally eliminate competition between the consolidating firms.

We concluded, under section 11321, that there would be no lessening of competition on the water route in question (horizontal or source competition). Although sections 11321 and 11344 differ somewhat in defining the relevant market, the two standards tend to converge in practice. Section 11321 involves competition on the water route in question, while section 11344(d) involves freight surface transportation in general. The "water route in question" is a more narrowly defined market, as we have discussed previously. The market under section 11344(d) is broader, involving all horizontal effects of the consolidation over a broad geographic area. However, no party has seriously argued that this transaction will have anticompetitive effects beyond those discussed in connection with section 11321, and indeed, the evidence submitted by the parties on these two sections is identical.

We have analyzed the transaction for possible anticompetitive effects on this broader market and find that none will result. The more broadly a market is defined, the more likely competitors there are and the less likely a consolidation of any two competitors will result in a lessening of competition. In the eastern half of the United States, where any possible effects of this transaction would be felt most strongly, there are numerous rail, motor, and water carriers (as well as pipelines and conveyor belts) competing for traffic. The consolidation of two carriers, even two as significant as CSX and ACBL, will not result in an increase in market power sufficient to lessen competition. Thus, we conclude that the consolidation will have no adverse effects on horizontal competition in any region of the United States.

ii. *Vertical Effects.* The possibility of vertical foreclosure as it affects horizontal and source competition at common points has been discussed previously under our analysis of section 11321(b). However, as these end-to-end effects are more particularly relevant to an analysis under 11344(d), we will analyze them again here.

End-to-end, or vertical, transactions may allow the newly combined system to divert traffic from remaining competitors and hence foreclose their ability to compete in the marketplace.[43] Loss of traffic to another carrier indicates either the presence of competition or its absence, and if diversions are attributable to greater efficiency (in the form of better service or lower rates) they are not anticompetitive.

Nevertheless, traffic diversions are not unrelated to potential competitive effects under section 11344(d). The consolidated carriers have an incentive to favor their own long haul routes as long as that routing is not less profitable than available interline routings. If one of the end-to-end consolidation partners formerly interchanged traffic with both its consolidation partner and other carriers in providing joint service, the transaction may foreclose the nonincluded carrier from competing in the markets it previously served.

If this occurs, the consolidated system may profit by limiting "downstream" competition and routing traffic over its own lines from origin to destination. We will discuss the possibility of vertical foreclosure effects on the transportation of coal, grain, and phosphatic chemicals in later sections. Here we will address those effects on all other commodity groups.

As discussed previously, CSX does not deliver significant volumes of any commodity, other than coal, to the river for further movement. CSX carried only approximately 1.1 million tons of non-coal commodities to the river for interlining with barges in 1981. The total tonnage transported on the

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[43] *See Brown Shoe*, 370 U.S. at 323-24; and *Norfolk Southern*, 366 I.C.C. at 316.

inland waterway system in 1981 was approximately 438 million tons. Even if we assumed that none of the 1.1 million tons of CSX traffic is currently forwarded to ACBL and that after consolidation all of it would be given to ACBL, the loss of such a small portion (0.25 percent) of all the traffic available to other water carriers could not result in any substantial competitive harm to the barge industry in particular or to surface transportation in general.

Further, as discussed previously, CSX-ACBL would be unable to engage in effective predatory pricing practices. Any attempt to manipulate their rates to divert traffic away from other carriers would result in a loss of revenue to CSX-ACL. As noted before, this loss of revenue could not be recouped since any attempt to later raise rates above the competitive level would result in re-diversion of CSX-ACBL's traffic to other carriers offering lower competitive rates. Further, the rate scissors tactic, (that could result in traffic diversions without a loss in revenues to CSX-ACBL or an increase in rates) while possibly effective in diverting CSX-originated traffic to ACBL from other competing barge lines, would not harm the public since rates must remain at competitive levels for the tactic to be effective.

In view of the governing economic conditions, integration of CSX and ACL will not place the consolidated firm in a position to vertically foreclose its competitors through rate manipulation or other forms of traffic diversion. Of course, because of increased efficiency, coordinated service, or lower rates, shippers may choose to use CSX-ACL rather than other available carriers. The voluntary selection of carriers for any of these reasons is not anticompetitive, but is, instead, the natural response to a healthy competitive market.

We conclude, therefore, that the proposed consolidation will result in no reduction in competition as a result of vertical foreclosure.

iii. *Conglomerate Effects.* A "conglomerate merger" of corporations is one where the consolidating firms are neither competitors nor potential or actual customers or suppliers of each other.[44] A conglomerate consolidation does not result in elimination of a competitor but merely substitutes the competition of the acquiring company for that of the acquired company in the market served by the acquired company. Such a combination does not itself result in any increase in market concentration.[45] Conglomerate consolidations are generally innocuous from an antitrust standpoint,[46] but they are within the reach, and are tested by the same standards, of Clayton section 7.[47]

Various parties in this proceeding have urged us to consider what are, in effect, conglomerate aspects of the proposed transaction. It is argued that the sheer size of the consolidated carrier will have anticompetitive effects. We disagree.

The consolidation of CSX and ACL is not a conglomerate combination. CSX and ACBL and other barge lines have a vertical relationship with CSX providing traffic for onward movement by barge. In addition, CSX competes directly with ACBL and other barge lines for certain traffic flows, so that the consolidation also has horizontal aspects. For those traffic movements where CSX and ACBL compete, we have found that the consolidation will result in an increase in market concentration (though not in reduction of competition). However, even when viewed as conglomerate in nature, we find that the transaction will have no effect on competition.

While the CSX-ACL system will provide extensive single system service throughout much of the East, its competitors also serve extensive territories and will be able to undertake

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[44] *United States* v. *General Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y. 1966).

[45] *United States* v. *Continental Can Co.*, 217 F. Supp. 761, 786 (S.D.N.Y. 1963), *rev'd on other grds.* 378 U.S. 441 (1964).

[46] *United States* v. *General Dynamics*, *supra* n. 49.

[47] *F.T.C.* v. *Proctor & Gamble Co.*, 386 U.S. 568, 577 (1967).

serious competitive responses to CSX-ACL initiatives. The carriers competing with CSX and ACBL, of all modes, are, for the most part, large sophisticated organizations. Many of the barge lines competing with ACBL today are owned by large corporate parents fully capable of supporting competitive responses to a combined CSX-ACL. Other railroads operating in the East are also large corporations. In addition, many of the shippers dealing with the consolidating carriers are large organizations capable of asserting their own economic power or asserting their legal rights, under the antitrust laws or the Interstate Commerce Act. Further, since many of the shippers also operate as carriers themselves, they can directly respond to any attempt by CSX-ACL to exercise market power.

We find it unlikely that the size of the consolidated carrier alone will result in any substantial lessening of competition. If, however, after consolidation, CSX-ACBL participates in discriminatory actions, or in restraint of trade, carriers and shippers are capable of availing themselves of various remedies if necessary. Moreover, we are imposing oversight and reporting conditions that will allow the Commission to monitor and correct any abuses that might occur.

iv. *Conclusion.* The proposed transaction will not result in a substantial lessening of competition, creation of a monopoly or restraint of trade in freight surface transportation in any region of the United States.

5. *Specific Commodities.*

a. *Coal Transportation.* Although barge transportation of coal does not constitute an economically separate market, its size and importance to CSX and ACBL warrants separate discussion. Coal is the most important commodity in the combining carriers' traffic base, accounting for 49 percent of CSX's tonnage and 56 percent of ACBL's.

Specific coal movements illustrate competition between CSX and barge lines, including ACBL. These movements are transported either by CSX in all-rail service or in a combination of barge and land carrier (rail, truck, conveyor), as shown in Table 9.

TABLE 9

INSTANCES OF COMPETITION BETWEEN CSX AND BARGE LINES FOR COAL TRAFFIC

Origins (Mines)	Destinations (TVA Steam Plants)	Via CSX	Via Barge
Camp Breckenridge, KY	Cumberland City, TN	Single line	Conveyor-ACBL
Pyro, KY	Gallatin, TN	Tidewater RR-CSX	Truck-ACBL
Fies, KY	Widows Creek, TN	Single line	ICG-barge
Western Kentucky	Johnsonville, TN	Single line	ICG-barge or all-barge (including ACBL).

Source: Verified statement of Billie K. Dean (TVA-4).

These instances provide examples of point-to-point competition between CSX and ACBL. Situations are described by other witnesses where a shipment could move either via CSX in single-line service or via CSX in conjunction with a barge line. In addition, applicants concede that there is competition, in an economic sense, between CSX and barge lines for coal traffic, because rail rates on many coal movements are constrained by geographic competition reflecting barge transportation rates on coal from other sources.

We will next consider the present degree of competition among barge lines transporting coal traffic. This traffic is handled by some 60 barge lines, of which the top 20 have the traffic shares shown in Table 10.

TABLE 10

BARGE LINE SHARES OF BARGE COAL TRAFFIC

Firm Number	Percentage Share of Coal Tonnage in 1981	Carrier
1	17.1%	ORCO
2	11.8	Crounse
3	10.9	American Electric Power
4	10.6	ACBL
5	6.5	USS Subsidiaries
6	4.7	Consolidation Coal
7	4.3	M/G Transport
8	3.5	Canal Barge
9	3.0	Valley and Affiliates
10-14	2.0-2.3	
15-20	1.0-1.9	

Source: Verified statement of Robert N. Stearnes, Table II-1 (DOT-6); rebuttal verified statement of Richard J. Barber, Appendix Table C (CSX-71).

The top four carriers maintained the same rank in 1981 as in 1977 and together accounted for about one-half of the barge coal traffic each year. Some utilities on the Ohio River System have awarded their major business only to the top four barge lines in recent years. Only TVA, among the major utilities appears to have a current policy that creates business for a diversity of barge firms. Nineteen companies bid for TVA business during the period 1980-83 and eight were awarded contracts: Crounse Corporation, The Ohio River Company (ORCO), ACBL, M/G Transport Services, Inc., Serodino Inc., Arrow Transportation, Hunter Marine Transport Inc., and the Valley Line Company.

It is undisputed that fierce price competition for coal traffic exist among barge lines. The existing concentration levels in the barge transport of coal only mean that barge firms with high traffic shares are efficient and are pricing competitively, so that at this time there is little to cause large coal shippers actively to seek out alternatives. As applicants' witness, William J. Baumol, notes:

> [I]f large barge operators supply good services at low prices, shippers may indeed prefer to deal with them. But let them try to behave like monopolists, and the shippers' alleged distaste for small carriers will evaporate. It is precisely this danger that keeps the large firms from misbehaving. . . [48]

Thus, it is not significant that the largest coal barge lines have large traffic shares, but that ratemaking among coal barge lines, as among barge lines in general, is highly competitive.

Since CSX and ACBL would presumably no longer compete against one another following approval of the transaction, there would be a reduction of one competitor for those coal movements susceptible to intermodal competition. WTA witness Dr. Alfred Kahn shows total 1981 rail and barge shipments to waterside counties of 142.7 million tons of eastern coal. The traffic shares he computes for CSX and ACBL are 30 percent and 9.5 percent, respectively, totaling 38 percent after adjusting for CSX-ACBL interline movements. Applicants show that, if the traffic base included western coal moving to the same counties, coal deliveries by truck or conveyor, and coal consumed at minemouth generating stations, and if joint rail-barge movements are included in the traffic share of the destination (barge) carriers, the traffic share for CSX would fall to 11.8 percent, and that of ACBL to 7.7 percent. Since we have found that coal transportation is not an isolated market, these percentages do not constitute market shares.

The transaction would not, in itself, reduce the number of barge lines competing for coal traffic. We find no sound reason to suppose that CSX would destroy ACBL's coal-carrying capability. It would gain no pricing freedom by doing so, since it would face even stiffer competition on coal traffic from other nonaffiliated barge lines. CSX's avowed aim is to coordinate its commonly controlled rail and barge services, to lower

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[48] Verified statement of William J. Baumol in reply to surrebutal, p. 5 (CSX-125).

costs on existing traffic interchanges, and to develop new marketing opportunities, such as the carriage of low-sulfur eastern Kentucky coal to Texas utilities. These are rational objectives that require the preservation of ACBL as a healthy carrier.

Although consolidation would not directly reduce the number of barge coal carriers, WTA contends that reduction would be the ultimate consequence. It envisions CSX conducting joint rail-barge coal transportation exclusively with ACBL, thereby foreclosing other lines from the transportation of coal shipments originated by CSX. The harm experienced by the larger coal carriers, particularly ORCO and Crounse, would go beyond the direct loss of revenue from the diverted shipments according to WTA. Assertedly, these carriers would experience higher unit costs due to lower remaining traffic density, which would render them unable to compete with ACBL for non-CSX-originated traffic. Finally, WTA contends that these large water carriers are the only serious contenders for major coal movements. With their disappearance, it argues, CSX and ACBL would have the field to themselves and could engage in monopoly pricing.

Applicants do not pretend that CSX would attempt to maintain the present level of traffic interchange with barge lines other than ACBL. Clearly, CSX and ACBL intend to use their integrated rail-barge operation to compete more effectively for the available coal traffic. At the same time, CSX declares that it would not interchange traffic with ACBL that could be handled at lower cost by another barge line. We think this is certainly true. In a competitive market, CSX must use the lowest-cost barge connection to offer the lowest possible through rate. If CSX fails to do so, it risks losing business for itself and its shippers as receivers turn to coal transported more cheaply from other sources. On traffic that ACBL can handle as efficiently as other barge lines, however, we think it likely that CSX would encourage movement by ACBL wherever possible. For purposes of a worst case analysis, we will assume that, as protestants contend, most CSX-originated traffic would eventually be routed via ACBL.

Diversion of CSX-originated coal to ACBL could not, in itself, reduce competition in coal barging. This coal constituted only 13 percent of the coal tonnage handled by barge lines in 1981.[49] Most of the diversion would be from ORCO and Crounse, but even after losing all CSX-originated coal, along with associated backhauls, ORCO would still be as large a coal carrier as ACBL is today, and Crounse would still be one of the top 3 common carriers of barged coal.[50] Redistribution of traffic among the top coal barge lines would not, standing alone, have any adverse effect on the present vigorous price competition in coal barging.

The crux of the water carriers' argument is a contention that loss of the CSX-originated traffic would reduce the present economies of scale and density enjoyed by ORCO and Crounse and raise the unit costs of handling their remaining traffic. ORCO asserts that its operating costs would increase by 19 percent per ton and that its fuel consumption would rise by 29 percent per ton-mile. These cost increases would allegedly destroy the viability of ACBL's two main competitors.

We do not accept this argument or ORCO's figures in light of other facts of record. Numerous coal carriers maintain viable operations with substantially less tonnage than either ORCO or Crounse would have after the assumed traffic diversion. While any carriers which experienced loss of CSX-originated

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[49] CSX originated 18.7 million tons of barged coal; 140.6 million tons of coal were reported to the Corps of Engineers as being shipped by barge in 1981.

[50] WTA shows these carriers' 1981 coal tonnage as follows:

ORCO	24,566,155
Crounse	19,292,000
ACBL	16,290,200
All others	Less than 6,000,000 each

These figures, collected in WTA's posthearing brief at page IV-213, are drawn from verified statements of the named carriers. They are somewhat higher, especially for Crounse, than the figures reported to the Corps of Engineers (reflected in Table 10).

traffic would have to adjust their fleet sizes and operating schedules to the traffic remaining, their unit operating costs would not necessarily rise significantly. Nor does it appear that ABCL's unit costs would fall significantly as a result of greater participation in CSX-originated traffic. If unit costs were correlated with traffic volume in the manner argued by protestants, the largest water carriers would long ago have been able to drive the other barge lines from the market. The record shows, however, that smaller coal carriers continue to operate and even to grow,[51] and, as previously noted, they continue to capture utility contracts in the face of competition from larger carriers. Thus, we do not think that the assumed "worst case" traffic diversion would harm barge lines competing with ACBL beyond the loss of revenue attributable directly to CSX-originated traffic and associated backhauls. Since these carriers would remain viable competitors, ACBL would face no fewer competitive constraints in its pricing of coal movements after the consolidation than it faces today.[52]

Finally, competitive pressures on the joint coal service of CSX and ACBL will be considerable. The mine areas that CSX serves (if not always the specific mines) may also, in many instances, be served by trucks, other railroads, and even by conveyor systems, that provide through service with barge lines other than ACBL. Coal receivers are also able to obtain coal transported from CSX origins from other carriers (inter and

[51] Firms with at least 7 percent of barge coal traffic just maintained their market share (50 percent altogether) from 1977 to 1981, while firms with 3.5 to 7 percent of coal tonnage lost market share (from 23 percent to 15 percent) and the remaining smaller sized firms gained market share (from 27 to 34 percent). According to the "survivor principle" of applicant's witness, Dr. George J. Stigler, if certain size classes of firms enjoy true cost advantages over other size classes, the former should gain market share from the latter over time.

[52] Even if a carrier of ACBL's size could achieve economies of density with additional traffic, it could translate such economies into further traffic gains only by offering reduced rates. The moment it failed to give shippers the benefit of its economies, it would lose the acquired traffic. Thus, while economies of density might afford a competitive edge, they could not confer market power in a highly competitive market such as coal barging.

intramodal competition) and different coal from other areas (source competition). In those instances, where a receiver might be technologically or contractually tied to coal from a mine served only by CSX, the consolidation would not give CSX more market power over the traffic than it already has.[53] Since common control will not relieve CSX railroads or ACBL of the need to compete for traffic and will not reduce the ability of the market to sustain an ample number of other carriers, we find the evidence of record demonstrates that the combination will not reduce competition in coal transportation.

b. *Agricultural Commodities*

i. *Grain and Grain Products.* CSX and ACBL also transport grain and grain products. In 1982, grain and grain products accounted for 4 percent of CSX's total tonnage and 22 percent of ACBL's total tonnage. Table 11 sets forth the tonnage figures for CSX and ACBL movements of corn, soybeans, soybean meal, and wheat for 1980, 1981, and 1982.

TABLE 11 (IN MILLION TONS)

		CORN	SOYBEANS	SOYBEAN MEAL	WHEAT
1980	CSX	10.3	2.9	1.8	1.4
	ACBL	2.3	1.2	0.8	0.5
1981	CSX	8.6	2.8	1.5	2.0
	ACBL	2.4	1.1	0.8	0.7
1982	CSX	8.5	2.8	1.3	1.9
	ACBL	3.0	1.8	1.2	0.7

Source: Submitted by Barber (Appendix, Supplemental Information, CSX-38).

For all types of grain (not including grain mill products), ACBL transported about 5.3 million tons in 1981, or about 8.9 percent of the 59 million tons of grain transported on the inland river system that year. ACBL carried 1.7 million tons of grain mill products (5.8 percent of its total traffic) in 1981, or about 16.5 percent of the approximately 10 million tons of grain mill products moving by barge. CSX's grain mill products tonnage for 1981 amounted to 1.2 percent of its total traffic and 10.3 percent of the grain mill products carried by all Class I railroads.

[53] See discussion, *supra*.

Despite the substantial amounts of grain transported by CSX and ACBL, applicants generally serve different parts of the markets. About 88 percent of all ACBL's grain traffic for 1981 originated at points on the Ohio River and on the Upper Mississippi and Illinois Rivers and was destined for export elevators in Louisiana. Much of the rest of ACBL's grain traffic was destined to Southeast points on the Tennessee River. In contrast, about 85 percent of the grain shipped by CSX's subsidiaries C&O and B&O in 1982 moved in unit trains for export to Baltimore, MD, Philadelphia, PA, and Norfolk, VA. CSX's other major rail subsidiary, SBD, on the other hand, participated in grain traffic destined to points in the Southeast and moved a small amount of grain traffic to points in Louisiana.

We will consider the horizontal and vertical effects of the proposed consolidation on those grain and grain mill products where ACBL and CSX compete. We will look first at the intensity of CSX competition with ACBL for the transportation of export and domestic grain and grain mill products destined to points in Louisiana and the Southeast. We will also examine CSX's participation in traffic delivered to points along the river system for subsequent movement by barge to determine the extent of control CSX-ACBL would be able to exert over access of traffic to the river and thereby vertically foreclose independent water carriers from competition.

a. *Grain to Louisiana.* The destinations for 92 percent (approximately 54 to 59 million tons) of the grain moving on the inland river system in 1981, and for 88 percent of ACBL's grain traffic, were export elevators on that part of the MRS between The Passes and Baton Rouge, LA. ACBL carried 8.5 percent of that traffic to Louisiana export points. In general, rail carriers were not a significant factor in grain shipments to Louisiana, with the possible exception of corn traffic, and carried only 4.3 million tons of grain to Louisiana points. Of that 4.3 million tons of grain, rail carriers carried 3.9 million tons

of corn to this market in 1981, compared to the almost 30 million tons carried by water. CSX carried only 21,000 tons of grain (of which only 10,000 tons were for export), or less than 0.5 percent of the market, to Louisiana. CSX is not engaged in significant parallel competition with ACBL in this market.

A combined ACBL-CSX might, however, be able to vertically foreclose the Louisiana grain corridor if CSX controlled a large share of grain movements to the river for subsequent water movement to Louisiana. This is not the case. Grain being transported to Louisiana by water carrier often must be transported relatively short distances from origin to the inland river system. Several transportation alternatives exist for this grain. For movements to the water, trucks provide a practical and economical alternative to railroads. Many grain-loading facilities along the river system are served exclusively by motor carriers. Trucks are the predominant carriers of grain for movements of under 100 miles. Railroads and trucks compete effectively for traffic on movements of up to 150 miles and, in the case of export grain, up to 200 miles. Railroads generally carry most grain movements between 150 and 300 miles, unless motor carriers can establish a back haul.

As a result of these factors, CSX's participation in traffic to counties where grain begins its water movement to Louisiana is small. CSX delivered to the river only two-tenths of one percent (93,000 tons) of the total river movement of corn (30 million tons) to Louisiana. CSX's highest concentration of this corn traffic was only 8 percent of the corn moved to counties on that part of the Ohio River between the mouths of the Ohio and Green Rivers. A combined CSX-ACBL will not be able to vertically foreclose corn traffic.

To those counties along the river that accounted for 96 percent (13.4 million tons) of the movements of soybeans to Louisiana, CSX delivered 3 percent (414,000 tons) of the traffic moved. This figure for CSX soybean traffic is somewhat inflated because CSX delivered twice as many soybeans (379,000 tons) to counties along the Tennessee River as were moved

from those counties by water (147,000 tons) to Louisiana; presumably much of CSX's soybean traffic was for domestic consumption in the Southeast. Even if we assume that CSX controlled access of soybean movements to the Tennessee River, a combined CSX-ACBL would not be able to maintain prices at noncompetitive levels because only 1 percent of the soybeans moving by water to Louisiana originate on the Tennessee River. Again, a combined CSX-ACBL will not be able to vertically foreclose competition on soybean traffic to Louisiana.

CSX delivered about 2.5 percent of the wheat moving to those counties along the river that accounted for 85 percent (9 million tons) of all the wheat traffic moving by water to Louisiana. CSX handled 168,000 tons, or 21 percent, of the wheat moving to counties along that part of the Ohio River between the mouths of the Ohio and Green Rivers. Other rail carriers delivered 642,000 tons to those counties, presenting sufficient competitive alternatives for shippers. Furthermore, since the CSX tonnage represents only 1.6 percent of the wheat traffic moving on the river to Louisiana, a combined CSX-ACBL will not have the market power to vertically foreclose competition for this traffic.

In regard to other grains delivered to counties along the river, CSX carried an almost negligible amount (less than 1 percent of other grain moving to Louisiana). To those counties along that part of the Mississippi River between Minneapolis, MN, and the mouth of the Missouri River, CSX carried 3 percent (9,000 tons) of the other grains (231,000 tons) moving from those counties by water to Louisiana. Again, because of a small market base, a combined CSX-ACBL will not be able to vertically foreclose water carriers from competing for grain traffic moving to Louisiana.

(b) *Grain for Export.* The grain traffic that ACBL carries to Louisiana for export is also subject to source competition from export grain moving from points east of the Mississippi River by rail to Atlantic ports and by truck and rail to

Great Lakes export points. CSX competes with ACBL and other water carriers for export grain traffic originating in Illinois, Indiana, Ohio, and Michigan. In 1981, CSX moved 4 million tons of corn, soybeans, and wheat from these States to Baltimore and Norfolk for export; total exports from Baltimore and Norfolk were 12 million tons. CSX moved 99,000 tons from the four State area to Great Lakes ports for export; total exports from Great Lakes ports were 6.6 million tons. For the same time period, barge shipments from the four State area to Louisiana totaled 19 million tons, total exports through Louisiana were 54-59 million tons, and ACBL's traffic to Louisiana was over 4.6 million tons.

This source competition operates to maintain levels of prices and services, and we conclude that geographic and intermodal competition exists for export grain in the four State area. Furthermore, inasmuch as CSX delivers only 220,000 tons of these grains to counties on the river in the four State area, applicants will not be in a position to vertically foreclose water carriers from competing for grain traffic from the four State area.

(c) *Tennessee River Corn.* The Tennessee River is the primary domestic route for movements of corn on the inland river system. In 1981, more than 87 percent (786,000 tons) of the water movements of corn to the Tennessee River originated from the Illinois River (366,000 tons) and from the Mississippi River north of the mouth of the Missouri River (420,000 tons). ACBL carried 18 percent (68,000 tons) of the corn from the Illinois River and 59 percent (248,000 tons) from the Upper Mississippi, or about 40 percent of the total corn from both origins.

There are parallel rail movements of corn to Alabama (near the Tennessee River) from points in Illinois and Indiana. CSX moved 53 percent of the approximately 526,000 tons of corn moving by rail from Illinois and 84 percent of the 679,000 tons from Indiana. Other railroads shipped 353,000 tons of corn from Illinois and Indiana.

Together, ACBL and CSX accounted for approximately 56 percent of the corn moving by rail or river from these origins to the Alabama-Tennessee River market. Even with this substantial share of the traffic, a combined CSX-ACBL would not be able to foreclose competitive alternatives available to shippers. The other railroads that carry 47 percent of the corn moving from Indiana and Illinois and the other water carriers that account for 60 percent of the water traffic provide sufficient competition to prevent CSX and ACBL from reducing competition even though their routes are parallel.

For applicants to assert vertical control over the river movement of corn, CSX would have to handle a large share of the corn moving to counties along the river for subsequent water movements to the Tennessee River. CSX moves no corn to counties along the Upper Mississippi River, and less than 1 percent (14,000 tons) to counties along the Illinois River. CSX is not in a position to vertically foreclose other water carriers from competition for corn traffic moving from the Illinois River and the Upper Mississippi River to the Tennessee River because it does not control the origin leg of this movement.

(d) *Grain Mill Products.* ACBL transported 1.7 million tons (16.5 percent) of the approximately 10 million tons of grain products moving on the river system in 1981. Grain mill products were 5.8 percent of ACBL's total traffic. Traffic to Louisiana accounted for 94 percent of the water transportation of grain mill products.

CSX handled 10.3 percent of the total tonnage of this commodity group carried by all Class I railroads in 1981; it amounted to 1.2 percent of CSX's total traffic. Rail movements of this commodity to Louisiana, however, are relatively insignificant. Compared to approximately 9.5 million tons moving by water to Louisiana, all rail carriers moved only 535,000 tons (5.4 percent) and CSX moved only 13,000 tons. CSX's share of the rail traffic to Louisiana was a scant 2.4 percent,

and its share of the traffic moved by rail or water was an insignificant 0.1 percent. Competition between CSX and ACBL for the movement of grain mill products to the Louisiana market is virtually nonexistent.

In addition, in terms of total river shipments, the market for grain mill products is not heavily dependent upon CSX for delivery to counties on the river. Only 5 percent of the total tonnage loaded on barges for moves to Louisiana could have relied on CSX traffic to the river. CSX did have a significant amount of traffic moving to counties on the Tennessee River (78,000 tons) and to parts of the Ohio River (311,000 tons). That traffic, however, moved in directions other than toward Louisiana, and would most likely not be competing with traffic destined to Louisiana. Inasmuch as the CSX traffic to counties on the Ohio and Tennessee Rivers represents about 2 percent of the total grain mill products barged to the Louisiana market, it is clear that the opportunity for vertical foreclosure does not exist in that market.

We conclude that the evidence shows that consolidation of CSX and ACBL will not result in a reduction in competition for the transportation of grain and grain products. For the most part, CSX and ACBL experience little parallel in competition. In those cases where parallel competition exists between the applicants, other rail and water carriers enjoy sufficient shares of the market to preserve competition. Finally, the consolidation of ACBL and CSX will not result in vertical foreclosure of other water carriers from competition because CSX does not control access to the necessary river origins.

ii. *Fertilizer.* CSX and ACBL do not compete for fertilizer traffic because ACBL does not engage in any significant transportation of fertilizer. ACBL handled only 8,310 tons of phosphate rock and phosphatic chemicals in 1981. Therefore, the consolidation of ACL and CSX would not eliminate a competitor for fertilizer traffic. Rather, the issue raised by protestants with respect to this traffic concerns the current movements by CSX railroads, and applicants' future plans for further development of these movements with ACBL.

After consolidation, applicants intend to offer three new fertilizer transportation services: (1) unit train movements of phosphates from Florida to a water interchange at a Tennessee River point for ultimate destinations along the Mississippi and Illinois Rivers in Midwest; (2) an ocean-going barge movement of phosphates from Tampa to the lower Mississippi River or Texas Gulf Coast; and (3) a rail-water movement of potash from Canadian sources to the Southeast.

The Bone Valley region of Central Florida is the center of one-half the nation's phosphatic chemical production capacity. Another one-fifth of the phosphatic chemical production is along the lower Mississippi and the Gulf Coast. The remainder comes from North Carolina, northern Florida, and the West. Due to a decrease in export traffic, the phosphate industry is suffering a decline. Since 1980, the production of granular triple super phosphate and diammonium phosphate has dropped by about one-third and production of monammonium phosphate by about 37 percent.

SBD transports phosphate rock (about 14.4 million tons in 1981), the source of phosphatic chemicals, from the Bone Valley to terminals at Tampa for delivery to water carriers operating in the Gulf and for export. SBD's share of nationwide phosphate rock traffic originated by Class I railroads was 86 percent in 1981. Between 60 and 70 percent of the phosphate traffic moving through Tampa is for export. SBD also originates phosphatic chemicals from the Bone Valley to destinations adjacent to the river system in Minnesota (38,123 tons in 1981), Wisconsin (4,193 tons), Iowa (79,880 tons), Illinois (180,628 tons), Indiana (45,917 tons), and Missouri (58,651 tons).

SBD is the only Class I railroad serving the Bone Valley and the Tampa phosphate terminals. Some phosphatic chemicals move by motor carrier to Tampa prior to export. Approximately 90 percent of the 16 million tons of phosphate rock transported to Tampa in 1981 moved by rail. CSX handles 56 to 75 percent

of phosphatic chemicals moves destined to Tampa for export (2.9 million tons in 1981) and 80 to 85 percent of all phosphate (rock and chemicals traffic) to Tampa.

DOT contends, and we agree, that the consolidation will not have an adverse effect on the water transportation of phosphates (rock and chemicals). ACBL has not participated in applicants' proposed ocean-going barge service, and is currently not prepared to conduct this service. If applicants implement joint operations, it appears that shippers would benefit from applicants' new service as long as applicants price competitively. If on the other hand, applicants attempt to offer the ocean-going service at too high a price, shippers will continue to use existing traffic patterns.

Motor carriers also compete for the transportation of phosphates to Tampa, especially on phosphatic chemicals traffic which is increasing its share of the declining phosphate market. Two of the seven Tampa phosphate terminals identified in the record are served exclusively by truck; the other five are served only by rail. The average move from Bone Valley phosphate sources to Tampa is between 40 and 50 miles.

DOT notes that other competitive forces appear to be restraining CSX's rates and services for phosphate traffic to Tampa. CSX now provides a joint-line phosphate rock service with several water carriers even though CSX would have a longer haul if it provided single-line rail service to phosphate processors. DOT persuasively suggests that the large shippers and receivers move sufficient volumes of traffic to constrain CSX's pricing. Also, on May 7, 1982, in Finance Docket No. 30482, the Florida West Railroad Company filed a petition for exemption of its construction and operation of a 20.25 mile rail line that will serve the Bone Valley and provide another competitive restraint on CSX. WTA's argument that CSX will reduce competition for the water movement of phosphate rock, on the other hand, has little merit. CSX would have an incentive to use the most efficient available carrier, and as

long as prices do not rise, shippers will not be harmed if ACBL is that carrier. However, if the CSX-ACBL cost of transportation increases, phosphate shippers have readily available transportation alternatives to maintain competition. Finally, an increase in CSX rail rates to Tampa would lead to lower traffic volumes because Florida exporters would be placed in a less competitive position worldwide. This is contrary to CSX's self interest in generating large volumes of traffic over its line to generate a return on its investment.

Applicants' proposed potash service would compete with existing all-rail movements from Canada and Mexico. The new potash traffic will also be a partial backhaul for phosphate movements to the Midwest. Since potash now moves mostly by rail, the consolidation would not result in a reduction of competition on the water route for potash.

Therefore, based on the evidence of record, we conclude that the proposed consolidation would not have any adverse impacts on the water transportation of fertilizers.

C. PUBLIC BENEFITS. The finding that this transaction will not result in any substantial lessening of competition in any region of the United States does not require a further discussion of the public benefits of the transaction. However, these benefits should be noted.

Many of the benefits likely to result in any consolidation are benefits to the corporate entities seeking our approval, *i.e.*, private benefits. However, some private benefits also reflect public benefits.

Private benefits that are also public benefits include cost reductions and service improvements resulting from operating efficiencies. With improved service, resources are used more efficiently and energy, labor, and inventory costs decline throughout the transportation industry as well as the economy as a whole. Cost reductions resulting from more efficient operations benefit the public directly to the extent that they are passed on to shippers through reduced rates or deferred rate

increases. Savings generated by cost reductions reflect the amount of resources freed for other productive uses.

Efficiency-related cost reductions also benefit the public by creating a stronger, responsive, and competitive transportation industry. Activities that enhance competition are in the public interest because the public ultimately benefits from the efficient use of resources that are a result of competition.

Applicants estimate that the CSX-ACL consolidation will produce $5 million in quantifiable net benefits derived from operating and administrative efficiencies after giving effect to all changes resulting from the consolidation. Applicants also state that many unquantifiable benefits will flow from this consolidation.

The service improvements resulting from consolidation represent a public benefit. As many of the supporting shippers note, this benefit derives mainly from the institution of a new intermodal single system transportation service between regions and markets. This unquantifiable improvement is the greatest public benefit presented by the combination, and we afford it great weight. The CSX-ACL system will provide new single system service between such areas as the Upper Midwest and Florida and between eastern Kentucky and Texas. These new service options are discussed more fully in the Operating Plan.

Shippers generally prefer single line or single system service because it improves reliability, transit time, and equipment availability. Shippers can more efficiently use their resources by dealing with and relying on one carrier, instead of several, on questions of schedules, special service requirements, load tracing, and loss and damage claims. Shippers can benefit from improved equipment availability if both rail and barge management can implement a unified plan for the efficient use of their equipment, resulting in more reliable service. Shippers can also benefit from improved transit time, and the resultant reduced equipment costs, because the consolidated rail-barge system can minimize interchange delays through improved communication, joint planning, and joint scheduling.

Applicants state that better coordination between the rail and barge portions of a move will occur and will allow for improved service, particularly at terminal or interchange points. Joint communications and scheduling will allow barges and railroad cars to arrive at terminals at the proper intervals to assure expeditious transfer of cargo from barge to rail (or rail to barge) without the 3 or 4 day delays that can now occur. For example, they plan to reduce the time between arrival and departure of cars through the Louisville terminal to approximately 24 hours. Applicants also propose to implement system-wide purchasing, communications, computer access, and training activities. All of these changes will benefit the public by facilitating the system's response to changing needs of shippers. These proposed changes are also outlined in the Operating Plan.

We conclude that based on the evidence the proposed consolidation of CSX and ACL will result in public benefits. Shippers and the general public will benefit from the improved efficiency and reliability of single system service. The savings resulting from the consolidation, both quantifiable and non-quantifiable, may result in rate decreases, deferrals of rate increases, and a more efficient and viable transportation system.

D. CONDITIONS.

1. *Oversight and Reporting Conditions.* We have found that, based on the evidence of record in this proceeding, control of ACBL by CSX will not reduce competition or harm the public interest. Nevertheless, because in many respects this is a case of first impression, we will impose certain oversight and reporting conditions on this transaction. This decision allows the first integration of a major rail carrier and a major water carrier in many years. While based on this record we are confident that no adverse consequences should result, it is impossible to predict, with absolute certainty, what the consequences may be several years in the future. Therefore, we are imposing conditions that will enable us to oversee the consoli-

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dation after consummation, and to take corrective action, if necessary, to deal with any anticompetitive effects that we could not predict.

The specific conditions we impose may be summarized as follows:

a. *Corporate Structure.* The corporate structure of ACL and its subsidiaries may not be altered without Commission approval, nor may ACL transfer valuable assets to CSX without Commission approval. This condition preserves the feasibility of divestiture, should it become necessary.[54]

b. *Reporting.* Applicants shall file ACL balance sheets and profit and loss statements at specified intervals, as well as information on CSX's rate changes and contracts for service to transshipment points served by ACBL. The commission may require additional information in annual notices of oversight proceedings. This information will allow the Commission to determine whether CSX-ACBL have engaged in anticompetitive activities and whether ACBL is being maintained as a viable competitor.

c. *Oversight Proceedings.* Each year for 5 years, the Commission shall conduct an oversight proceeding, in which an Administrative Law Judge shall review the annual reports required by the foregoing reporting condition and shall consider public comments on these reports and on compliance of the transaction with 49 U.S.C. 11321. Based upon this review, the Judge shall submit a recommendation to the Commission on whether the consolidation proceeding should be reopened. Parties contending that reopening is warranted will be expected to provide evidence of specific problems flowing from the consolidation. If no party submits evidence of adverse effects and if the evidence submitted by CSX-ACBL does not warrant it, the proceeding will not be reopened.

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[54] In the event of a reopening of this proceeding by the Commission and of a finding that the results of control of ACL by CSX violate the Panama Canal Act, CSX may be required to divest itself of ACL and/or ACBL.

Under 49 U.S.C. 11351, we have continuing jurisdiction to enter supplemental orders in consolidation proceedings and to modify a decision authorizing consolidation.[55] Our authority to modify consolidation decisions includes the ability to impose further conditions or, if warranted by the facts, to order divestiture. Thus, the conditions we are imposing, while not necessary to retain our jurisdiction, will assure that the retained jurisdiction will be meaningfully exercised and will give parties an added opportunity to demonstrate any specific anticompetitive effects of the consolidation.

The imposition of these oversight and reporting conditions does not preclude any other remedy that an aggrieved party might have under the law, including the right to file complaints and petitions to reopen. Neither do these conditions constitute prejudgment that CSX-ACL will engage in anticompetitive activities. The ultimate issue in a reopened proceeding will be whether the consolidation has in fact resulted in anticompetitive consequences.

We wish to make it clear that the burden of proof is on the parties to come forward with evidence that there have been adverse effects resulting from this transaction. These conditions are designed and meant to allow the Commission to *react* to problems which are brought to its attention rather than to *act* on its own when no evidence of harm has been presented.

The text of the conditions being imposed is set forth in Appendix E.[56]

2. *Public Interest Conditions.* Several parties have proposed conditions to counteract the alleged anticompetitive effects of the consolidation. These include rate and terminal equalization, rate reasonableness, and trackage rights conditions.

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[55] *See Finance Docket No. 23388, Chicago & North Western Railway Co.—Merger—Chicago Great Western Railway Co.—Petition to Reopen* (not printed), served September 8, 1983, at 3.

[56] These conditions encompass the second condition proposed by Tampa Electric Company. TEC's first condition, retention of jurisdiction, is unnecessary since it is statutory. TEC's third condition, essentially requiring a minimum rate of return on ACL's investment, is unacceptable for the reasons set out in the Public Interest Condition section, *infra*.

On September 26, 1983, we served a notice of applicants' intent to file an application. In that notice we specified that our railroad consolidation regulations and procedures, with appropriate modifications, were suitable for this proceeding. Further, the main criteria for imposing conditions in rail mergers and consolidations (anticompetitive effects) is also the main criteria for considering control applications under section 11321. Thus, we find that although the public interest standard was formulated in the context of rail-rail consolidations, it is equally appropriate for rail-barge (or other intermodal) consolidations.

The basic test for determining whether a need for a public interest condition exists is whether the transaction will have anticompetitive consequences (or threaten other possible harm to the public). If a transaction does not pose any problems of possible harm to the public interest, then no public interest conditions should be imposed. If the public interest is threatened, then appropriate conditions must be formulated to ameliorate the harm. If these conditions can not be formulated, then the transaction should either be approved without conditions, if it offers benefits that outweigh the threatened harm; or be denied, if the harm outweighs the benefits.[57]

The Edison Electric Institute and Eastern Coal Transportation Conference proposed conditions that would require CSX to provide joint service with other barge lines and through other river terminals under the same rates, terms, and conditions that CSX would offer for joint service with ACBL and through ACBL-owned terminals. EEI would also require CSX to prove, in rate reasonableness proceedings, that CSX revenues are not being used to subsidize ACBL. ICI America's proposed conditions would require CSX to consent to any request for trackage rights made by any water carrier desiring to conduct rail operations over CSX lines that intersect with waterways.

We find that based on the supporting evidence, the parties have not met the criteria for imposing public interest conditions. We have already concluded that this transaction will not

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[57] *Union Pacific—Control—Missouri Pacific; Western Pacific*, 366 I.C.C. 459, 563-64 (1982).

have any anticompetitive effects and is in the public interest. Moreover, our reporting and oversight conditions will enable monitoring of any possible harm to competition from the transaction. Rate and terminal equalization conditions would detract from the benefits sought through this consolidation by precluding CSX and ACBL from pricing their more efficient joint routes at lower rates.[58] Rate reasonableness conditions, such as those suggested by EEI, would place an undue burden on CSX's rate making freedom, contrary to the letter and intent of the Staggers Rail Act.[59] Further, the trackage rights condition offered by ICI could substantially disrupt CSX's operations without a concommitant *public* benefit. Since none of the parties requesting conditions has proven that the public interest is threatened and that the suggested conditions would ameliorate that threat, no public interest conditions will be imposed.[60]

E. Labor Protection. As required by 49 U.S.C. 11347, we consider the interests of, and provide protection for, rail carrier employees affected by a consolidation. Applicants expect that no changes affecting rail carrier employees will occur as a result of the proposed transaction. Patrick W. Simmons, Illinois Legislative Director of the United Transportation Union, (UTU) asks that any labor protection imposed be extended to non-CSX rail employees affected by the consolidation as well as to CSX rail employees. Labor protection conditions are designed to protect only employees of railroads participating in transactions. We adopt the reasoning for this proposition set

[58] *Traffic Protective Conditions*, 366 I.C.C. 112 (1982).

[59] *See* 49 U.S.C. 10707.

[60] The Louisville and Jefferson County, KY, Riverport Authority (RPT), in its comment, requested conditions requiring rate and terminal equalization. It also requested that CSX be ordered to construct a direct rail connector with the Illinois Central Gulf Railroad Company and grant trackage rights to ICG over this line. RPT would also require CSX to solicit traffic at RPT's terminal in the same manner it solicits traffic for ACL's terminal at Louisville, KY. RPT withdrew from this proceeding on January 21, 1984. We have examined RPT's conditions and find they should not be imposed for the reasons discussed above.

forth in *Burlington Northern, Inc.—Control & Merger—St. L.*, 360 I.C.C. 784, 948-950 (1980), *aff'd sub nom. Missouri-Kansas-Texas R.R. Co.* v. *United States*, 632 F.2d 392, 410-413 (5th Cir. 1980), *cert. denied* 451 U.S. 1017 (1981). Therefore, UTU's request is without merit and will not be granted. We find that the transaction, with the conditions discussed below, is consistent with the public interest, insofar as CSX rail carrier employees are concerned.

New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), describes the minimum protection to be afforded those rail employees affected by a consolidation, absent a voluntarily negotiated agreement. The protections of *New York Dock* include a mandated 90-day notice of employment actions; negotiated implementation of employment changes resulting from a consolidation with compulsory arbitration of disputes; compensation of dismissed employees and differential compensation of displaced employees, at the rate of their last year of employment, for 6 years after impact (or for their period of employment if less than 6 years); reimbursement of moving expenses; and protection against loss from the sale of a home.

We may tailor employee protective conditions to the special circumstances present in a particular case. However, as we set forth in *Railroad Consolidation Procedures*, 363 I.C.C. 784, 793 (1981), unless it can be shown that because of unusual circumstances more stringent protection is necessary to provide employees with a fair and equitable arrangement, we will provide protection at the level mandated by 49 U.S.C. 11347. UTU has requested no modification of the *New York Dock* conditions, and we will impose those conditions without modification.

We are neither required nor have we been requested by any water carrier employee interest to consider the interests of, or provide protection for, water carrier employees. Nevertheless, it appears that the merger will provide additional opportunities for water carrier employees. For instance, applicants estimate that consolidation will result in an increase of 41 water carrier employee jobs on the new system. ACBL expects to add 13 new employees at the terminal it plans to establish on the Tennessee

River. For its dedicated chemical movements in joint service with Chessie and CMX, ACBL will require a full crew of 10 for year-round operation of the tow boat. ACBL also expects to hire two new crews of 9 employees each to handle the projected transgulf barge movements of phosphates and grain.

We find that applicants' estimates of employee impact are reasonable. No significant disruption of the carriers' work forces should occur. There should be no adverse impact on rail carrier employees because no rail carrier jobs are expected to be eliminated. The effect on water carrier employees should be beneficial since the number of water carrier jobs is expected to increase. Hence, we will not impose protection for ACBL's employees.

F. Environmental Impacts. On April 10, 1984, the Commission's Section of Energy and Environment (SEE) issued an Environmental Assessment (EA) analyzing the application. A Supplemental Environmental Assessment (Supplemental EA) was issued on June 19, 1984, after consideration of comments filed by applicants, Edison Electric Institute, TVA, and WTA, and jointly by Tampa Electric Company, Gatliff Coal Company, and Teco Transport & Trade Corporation. The EA, as modified by the Supplemental EA, analyzes the impacts of the consolidation on (1) the transportation system, (2) energy consumption, (3) air quality, (4) noise levels, and (5) safety. We will summarize the general conclusions of the EA and Supplemental EA rather than repeat their detailed analysis. We will also address SEE's response to the more significant aspects of the public comments. Our consideration of the EA and Supplemental EA leads us to conclude that the consolidation will cause insignificant energy consumption and environmental impacts.

The consolidation will create a new system composed of 27,000 rail route miles and 7,500 water route miles in the eastern half of the United States. CSX expects that the new system will result in a competitive intermodal transportation operation able to provide efficient through services and pricing and new marketing opportunities. CSX hopes to capture or recapture

several million tons of traffic available within its operating territory. CSX has identified ten potential market extensions and three possible capital improvement projects.

CSX's ten potential market extensions are expected to result in operational changes. Viewed both individually and collectively, the potential operational changes will not, however, have a significant effect on the quality of human environment or on systemwide and nationwide energy consumption. The potential operational changes will not result in (1) an increase in rail traffic of 50 percent or three trains a day on an affected line segment, or (2) an increase in railyard carload activity of 20 percent. Beneath these thresholds there are generally no serious impacts on air quality and noise levels and none have been found here. *See* 49 C.F.R. 1105.7.

CSX anticipates that the proposed changes in traffic patterns will result in increased fuel consumption for the combined system. This increase will be offset, because CSX will have captured or recaptured traffic from other less efficient transportation systems. This should result in a net decrease in overall fuel consumption nationwide.

The three possible capital improvement projects involve (1) constructing or upgrading a rail-barge transloading facility for coal on the Ohio River; (2) constructing a rail-barge transloading facility for potash, phosphate, grain, and similar commodities at a point on the Tennessee River; and (3) constructing a rail-truck transloading facility for chemicals at Philadelphia, PA. The proposed expansion and construction of these facilities will involve a short-lived increase in noise and dust. These short-term impacts, however, pose no appreciable threat to either the human or the natural environment. Operation of the three contemplated transloading facilities will create the potential for increased air and water pollution from fugitive dust, accidental spills, and barge-washing discharge. These potentially adverse impacts are, however, susceptible to mitigation.

Several commenting parties argue that the environmental consequences of Commission approval of the consolidation warrant preparation of an environmental impact statement

(EIS). They contend that NEPA requires that we assess in detail the impacts of the ten potential operational changes and three contemplated capital improvement projects. We disagree. Applicants' proposals for capital improvement and operational changes have not been developed to a point where more meaningful environmental analysis of these proposals is possible. Applicants' proposed operating plan considers potential changes and improvements illustrative of what would or might occur as a result of the consolidation. The exact nature or form of the changes and improvements with respect to environmental analysis is at this point still speculative.

TVA contends that applicants' plans for possible improvement or development of transloading facilities at Louisville, KY, and Decatur, AL, merit close environmental scrutiny. In addition, TVA argues that the possible upgrading of the Stevens Yard as an alternative to improvement of the Louisville coal terminal and the possible construction of a New Hope, AL, transloading facility as an alternative to development of the Decatur facility are in fact alternatives to a proposal for Federal action and as such also require close environmental scrutiny. TVA's interpretation is not supported by the facts. In their proposed operating plan, applicants refer to establishment of a new interchange at a Tennessee River point; it is in no way certain that applicants' future Tennessee River interchange, if constructed, will be at either Decatur or New Hope. Similarly, applicants' plans for a possible transloading facility on the Ohio River are not restricted to either Louisville or the Stevens Yard. Furthermore, applicants' tentative plans for any facilities on the Ohio and Tennessee Rivers are dependent upon applicants' future ability to reach the markets it envisions.

The Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA state that a proposal for a major Federal action significantly affecting the quality of the human environment "exists at that stage in the

development of an action when an agency subject to [NEPA] has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal *and the effects can be meaningfully evaluated"* (emphasis supplied). *See* 49 C.F.R. 1508.23. Here, applicants' proposals for intermodal coordination have not advanced to a stage of development where more meaningful evaluation of environmental effects is possible. Indeed, upon consummation of the proposed consolidation, applicants are under no obligation to complete the intermodal projects they are considering. They will, in fact, be free to develop other intermodal projects not yet considered and not mentioned in their application. The adequacy of the consideration given to environmental factors in an environmental document is governed by a rule of reason. In this instance, it is clearly unreasonable to expect an exhaustive analysis of impacts of projects that remain as ill-defined as the possible intermodal coordination plans contemplated by applicants.

The proposed action before us is our approval of the consolidation. We must consider the environmental impacts of that approval. We are not required, however, to consider the possible environmental impacts of less imminent actions. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n. 20 (1976). Applicants' contemplated intermodal plans are less imminent actions. TVA argues that we are the only agency in a position to look at the cumulative impacts of our approval of the consolidation. In respect to such cumulative impacts, however, we are not required to consider actions that are merely contemplated. *Hart and Miller, Etc.* v. *Corps of Engineers, Etc.*, 505 F. Supp. 732, 752 (1980). Furthermore, because applicants have alternate locations for their contemplated facilities on the Tennessee and Ohio Rivers, their plans are not proposed actions. *South La. Environmental Council, Inc.* v. *Sand*, 629 F.2d 1005, 1015-1016 (1980).

The contemplated capital improvement projects will be subject to further environmental review and permitting requirements should applicants decide to implement them. Some of the bodies that will be reviewing various parts of the plans ultimately implemented are the Federal Railway Administration, the Kentucky Department of Transportation, the Kentucky Department of Environmental Protection, the Jefferson County Air Pollution Control Office, the U.S. Army Corps of Engineers, the TVA, the Alabama Department of Environmental Management, the Philadelphia Water Department, and the Philadelphia Department of Licenses and Permits. Any Federal agencies subsequently involved with licensing implementation of applicants' contemplated plans will scrutinize proposals that entail significant environmental impacts. When applicants' plans for construction and site selection are made definite, detailed environmental review can be closely focused and therefore more useful to decisionmakers. *See County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368, 1378, *cert. denied*, 434 U.S. 1064 (1978).

Although it is not necessary for us to closely scrutinize the contemplated actions, we believe that the commenting parties have exaggerated the potential for adverse environmental impacts of those actions. TVA, for instance, contends that Louisville's existing air quality problems might be aggravated by expansion of applicants' coal terminal there. Applicants envision, however, only a return to the 1981 traffic level of 1.7 million tons and not the increase of 1.7 million tons a year that TVA fears. The coal terminal's contribution to local air quality problems will be no more significant than it was in 1981. In addition, the Louisville coal terminal now uses an enclosed dumper and covered conveyor and not the uncovered dumper and conveyor that TVA supposes. Finally, TVA's fears that expansion of the Louisville coal terminal will interfere with the planned redevelopment of the Louisville waterfront are unfounded because the most recent revision of the city's waterfront plan does not include the area of the coal terminal.

TVA's concerns about the potential environmental impacts at the contemplated Decatur site also are unnecessary. Adverse impacts to local water quality and aquatic wildlife in Wheeler Lake from dredging for riverfront construction would be no more than those experienced from the ongoing dredging by the Corps of Engineers for maintaining shipping channel depth. The Decatur municipal raw water intake is sufficiently far from the tentative construction site to be safe from contamination during operations. Furthermore, as DOT guidelines do not classify grains, potash, or phosphates as toxic or hazardous commodities, any impacts of possible spillage or barge washing should be minimal.

TVA also raises the possibility of the presence of endangered or threatened species of mussels near the potential construction site. This concern is misplaced. In connection with the proposed construction of an even larger barge terminal about six miles from Decatur in the Mallard-Fox Creek area TVA conducted tests and found no evidence of threatened or endangered species. In any event, before any construction can begin at Decatur, either TVA or the Corps of Engineers would have to prepare a study similar to the Mallard-Fox Creek study.

The potential noise levels in the area also present no environmental problem. Applicant does not plan to use a car shaker, and the closest residential area is more than 2,000 feet from the side. Noise levels in the area would be well under applicable limits.

Finally, the birds at Wheeler National Wildlife Refuge would not be subject to any greater impacts than they are now experiencing. Barges have been moored at the refuge islands with the acquiescence of refuge officials. That the birds remain at the refuge despite the noise and activity from Decatur's industrialized waterfront is strong evidence that they would not be driven off by construction and operation of an additional transloading facility.

VI. FINDINGS

Subject to the terms and conditions discussed above, we find that based on all the evidence of record (a) American Commercial Barge Line Company and the railroads controlled by CSX Corporation compete within the meaning of 49 U.S.C. 11321(a); (b) American Commercial Barge Line Company does not operate through the Panama Canal; (c) under the criteria of 49 U.S.C. 11321(b), acquisition of control of American Commercial Lines, Inc., and of its subsidiaries, including American Commercial Barge Line Company, by CSX Corporation will still allow ACBL to be operated in the public interest advantageously to interstate commerce and that it will still allow competition, without reduction, on the water routes in question; (d) under the criteria of U.S.C. 11344(d), the transaction will not cause a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any part of the United States, and the transaction will have no anticompetitive effects outweighing the public interest in meeting significant transportation needs; (e) the transaction does not contemplate a guaranty or assumption of payment of dividends or of fixed charges and will not result in an increase in fixed charges; (f) no other rail carriers seek inclusion in the transaction; (g) that the condition in Appendix E is required by the public interest; and (h) this decision will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. Water Transport Association's renewed petitions are denied.

2. The application, subject to the imposition of conditions, including the oversight and reporting conditions set forth in Appendix E, as discussed in the decision, is approved.

3. The authority granted is subject to the conditions for the protection of railroad employees enunciated in *New York*

Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), unless an agreement is entered prior to consolidation, in which case protection shall be at the negotiated level (subject to our review to assure fair and equitable treatment of affected employees).

4. If the applicants consummate the approved transaction, they shall confirm in writing to the Commission within 15 days after consummation, the date of consummation. Where appropriate, applicants shall submit to the Commission three copies of the journal entries recording the consummation of the transaction.

5. All notices to the Commission as a result of this authorization shall refer to this decision by date of decision and docket number.

6. No change or modification shall be made in the terms and conditions approved in the authorized application without the prior approval of the Commission.

7. This decision shall be effective 30 days from the date of service.

8. The requirement of an initial decision is waived pursuant to 49 U.S.C. 11345(e). This decision is final within the meaning of 49 U.S.C. 10327(g), permitting appeal only on the basis of material error, new evidence, or substantially changed circumstances.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett and Gradison. Commissioner Andre dissented in part with a separate expression.

(SEAL) JAMES H. BAYNE, Secretary

COMMISSIONER ANDRE, dissenting in part:

I would not impose oversight or reporting conditions. These conditions are not commonly imposed in acquisition proceedings. Such conditions are appropriate only if there are lingering doubts about the benefits of the acquisition. I have no such doubts.

[ICC DECISION] APPENDIX A

Abbreviations used in this decision

ACBL	— American Commercial Barge Line Company
ACL	— American Commercial Lines, Inc.
B&O	— Baltimore & Ohio Railroad Company
CMX	— Chessie Motor Express, Inc.
C&O	— Chesapeake & Ohio Railway Company
CSX	— CSX Corporation
DOE	— United States Department of Energy
DOJ	— United States Department of Justice
DOT	— United States Department of Transportation
EA	— Environmental Assessment
EEI	— Edison Electric Institute
MRS-GIW	— Mississippi River System — Gulf Intracoastal Waterway
NCA	— National Coal Association
NEPA	— National Environmental Policy Act
RPT	— Louisville and Jefferson County, Ky Riverport Authority
SBD	— Seaboard System Railroad, Inc.
SEE	— Section of Energy and Environment
TEC	— Tampa Electric Company
TGR	— Texas Gas Resources Corporation
TVA	— The Tennessee Valley Authority
USDA	— United States Department of Agriculture
UTU	— United Transportation Union
WATERCOM	— Waterways Communication System, Inc.
WTA	— Water Transport Association

Frequently cited cases

Brown Shoe	— *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962)
John I. Hay	— *Illinois Central R. Co.—Control—John I. Hay Co.*, 317 I.C.C. 39 (1962)
Lake Line	— *Lake Line Applications Under Panama Canal Act*, 33 I.C.C. 699 (1915)
New York Dock	— *New York Dock Ry.—Control—Brooklyn Eastern District*, 360 I.C.C. 60 (1979)
Norfolk & Southern	— *Norfolk & Southern Corp.—Control—Norfolk & W. Ry.*, 366 I.C.C. 171 (1982)
Southern Ry.	— *Southern Ry. Co. Section 5(15) Application*, 342 I.C.C. 416 (1972), *aff'd sub nom. American Waterways Operators, Inc.* v. *United States*, 386 F. Supp. 779 (D.D.C. 1974), *aff'd sub nom. Water Transport Ass'n* v. *United States*, 421 U.S. 1006 (1975).
Union Pacific	— *Union Pacific—Control—Missouri Pacific; Western Pacific*, 366 I.C.C. 459 (1982).

[ICC DECISION] APPENDIX B

COMMENTING PARTIES

Comments Supporting the Application[1]

Alabama River Pulp Company, Inc.
AOV Industries, Inc.
Atlantic Fertilizer & Chemical Co.
Bethlehem Steel Corporation
Carolina Steam & Stoker
Cedar Heights Clay Company, Inc.
Cherokee Warehouses, Inc.
City of Decatur, AL (Mayor)
City of Louisville, KY (Mayor)
Coal Marketing Corp.
Columbian Storage & Transfer Co.
Combustion Engineering, Inc.
Concoal Corporation
Cuddy Foods, Inc.
Dairy Feeds, Inc.
Degussa Corporation
Dollar Farm Products Company, Inc.
Durbin Paper Stock Company
Elkhorn & Jellico Coal Company, Inc.
Elston-Richards Storage Company
Evans Packing Company
Evart Products Company
Farmers Grain
Fillite U.S.A., Inc.
Flint River Mills, Inc.
Florida Silica Sand Co., Inc.
4th Street Fertilizer Co., Inc.
Fred Webb, Inc.
Gamble's Inc.
Gerber Products Company
Hamilton Farm Bureau Co-op. Inc.
Hartford Warehouse Services

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[1] A number of letters, both supporting and opposing the application, were received by the Commission before and after the comment period. These letters have been placed in the correspondence docket of this proceeding.

Hoechst Fibers Industries
Industrial Development Association
Interlake, Inc.
Johnston Boiler Company
Kenerco Corporation
Ken-Lick Coal Company, Inc.
Kentuck May Coal Company, Inc.
King Milling Company
K&R Corporation
L.B. Foster Company
Lewis Coal Company
Lincoln Brick Co. Inc.
Louisville Edible Oil Products, Inc.
Mansbach Metal Co.
Marion Power Shovel Division,
Dresser Industries, Inc.
Maryland Port Administration
McCabe-Woody & Company, Inc.
Michigan Fruit Canners
Michigan Packing Co.
National — Southwire Aluminum Company
Nugent Sand Company
Paul L. Broussard & Associates, Inc.
Pelham Phosphate Company
Petroleum Coal of Kentucky, Inc.
Polysar Latex Division, Polysar Incorporated
Potash Corporation of Saskatchewan
RBS Incorporated
Reagent Chemical & Research, Inc.
Rose's Stores, Inc.
R&T Coal Company
R.W. Griffen Feed, Seed & Fertilizers, Inc.
Southern of Rocky Mount, Inc.
Southern Silica, Inc.
Standard Oil Company
State of Alabama (Governor)
State of Florida (Department of Agriculture)
State of Georgia (Governor, Lieutenant
Governor, Dept. of Transportation, Dept. of
Agriculture, and Speaker of The
House of Representatives)

State of Illinois (Governor, Department of Transportation)
State of Indiana (Governor)
State of Louisiana (Commissioner of Agriculture)
State of New York (Department of Transportation)
State of South Carolina (Governor, Department of Agriculture)
State of Tennessee (Governor)
State of Texas (Governor)
State of Virginia (Governor)
Sunbelt Coal Sales, Inc.
Tex-Tube Division, Cyclops Corporation
Trojan Steel Corporation
U&ME Transfer, Inc.
Watervliet Paper Company, Inc.
Westvaco
Witco Chemical Corporation
W.R. Bonsal Company
W.W. Holding & Company, Inc.
Zephyr Inc.

Comments Opposing the Application

Agricultural Division, American Cyanamid Company
Allied Chemical
* American Waterways Operators, Inc.
Arkansas Oklahoma Port Operators Association
Arthur Smith Corporation
BCM Incorporated
Ben Greenberg Company, Inc.
Brunswick River Terminal, Inc.
Bunge Corporation
Cargill Incorporated
Carter-Waters Corporation
Charles G. Brown
Charter International Oil Company
Eastern Coal Transportation Conference

Formosa Plastics Corporation, U.S.A.
Greenville Port Commission
* Harvest States Cooperatives
Hercules Incorporated
* ICI Americas, Inc.
James River Limestone Company/Benwood Limestone Company
Kerley Industries, Inc.
Lake Carriers' Association
Milton P. Barschdorf
* National Coal Association
National Farmers Union
N-Ren Corporation
Ohio Edison Company
Placid Refining Company
Raleigh Junk Company
Reserve Barge Service, Inc.
Slanker & Company
Southern Scrap Materials Co., Ltd.
St. Philip Towing & Transportation Company
State of Kentucky (Transportation Cabinet)
* State of Minnesota (Department of Transportation)
State of Oklahoma (Governor's Waterways Advisory Team)
* Tampa Electric Company & Gatliff Coal Company
* TECO Transport & Trade Corporation
* Tennessee Valley Authority
Terra Chemicals International, Inc.
Transportation Chemicals International, Inc.
Transportation Institute
Tuloma Stevedoring, Inc.
Union Texas Products Corporation
* Water Transport Association
* Water Carriers (Joint Statement)
— Canal Barge Co., Inc.
— Crounse Corporation
— Dixie Carriers, Inc.
— S.C. Loveland Company

— M/G Transport Services, Inc.
— National Marine Service, Inc.
— The Ohio River Company
— SCNO Barge Lines, Inc.
The Valley Line Company
* Waterways Operators (Joint Statement)
— Agri-Trans Corporation
— Arkansas River Company
— Brent Towing Co., Inc.
— Dravo Mechling Corporation
— Express Marine, Inc.
— Harbor Towing & Fleeting, Inc.
— Hollywood Marine, Inc.
— Parker Towing Co. Inc.
— Shaver Transportation Company

Comments Expressing No Position

Agrico Chemical Company
Appalachian Regional Commission (Office of the Federal Co-Chairman)
Continental Grain Company
†† Edison Electric Institute
National Association of Regulatory Utility Commissioners
National Association of Wheat Growers
** PPG Industries
State of Mississippi (Governor)
** State of West Virginia (Governor)
** United States Department of Agriculture
† United States Department of Energy
† United States Department of Justice
*** United States Department of Transportation

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* also filed verfied statement
** later filed verified statement in opposition
*** later filed verified statement in support
† did not offer opinion on merits
†† filed verified statement; filed brief in opposition

[ICC DECISION] APPENDIX C

Summary of Competitive Analyses

The following is a summary of the positions and the major arguments of the parties. In each section we discuss briefly the points on which our findings disagree with the positions and analyses of the various parties. Unless otherwise indicated, we adopt those arguments and positions of the parties which are summarized in this appendix. Our findings are discussed more fully in the Discussion and Conclusions portion of the decision.

APPLICANTS

I. Direct CSX-ACBL Competition

Applicants state that the legislative history of the Panama Canal Act makes it plain that Congress' purpose was to prevent the predatory practice by railroads of controlling water carriers operating on water routes parallel to the railroads and using that control to drive independent water carriers out of business, thereby diverting the traffic to the railroads. Applicants assert that the Commission's requirement that direct competition under section 11321(a) be examined only through an assessment of traffic flows moving between narrowly construed common points of the combining rail and water carriers, defined precisely to include only the traffic between such points that both carriers are physically capable of handling, is consistent with the narrow focus of the Act on a specific type of predatory practice, since the "common points" competitive focus limits the prohibition of section 11321(a) to those rail and water operations that are parallel to some degree.

Applicants go on to state that while they do compete in one sense, they do not compete in the narrower sense that is the focus of section 11321(a). That is, they agree that there are some (although not many) local areas in which both CSX and ACBL deliver the same commodity and there are other markets in which, even if both CSX and ACBL do not presently

make deliveries, CSX and some other barge lines both do—and given the highly competitive nature of the barge industry and the mobility of barge assets and crews, the other barge lines might just as easily include ACBL. However, Applicants argue that in all (or virtually all) of these instances, the origins of the CSX and ACBL (or the other barge lines) movements are different, so that this CSX-ACBL competition falls within the category often termed geographic or source competition, and is not relevant for analysis of CSX-ACBL direct competition under the Panama Canal Act.

However, applicants state that, even though this conclusion is correct, it is based on a "legal technicality", and they urge the Commission not to make this the sole, or even primary, basis of a decision.

In much of what follows, applicants' arguments and conclusions are similar to those adopted by the Commission in the Discussion and Conclusions section. We provide here a brief summary of applicants' key points.

II. The Barge Industry Today

(a) *Degree of Market Segmentation*

Applicants assert that the relevant geographic and product market for the purpose of this proceeding is the carriage of all dry and liquid commodities on the Mississippi River System-Gulf Intracoastal Waterway (MRS-GIW).

In terms of geographic markets and competition, they state that the mobile nature of towboats and barges makes them adaptable for use throughout the entire inland waterway system, so that carriers can operate on any of the rivers that comprise the inland waterway network. They note that most barge traffic moves on two or more waterways.

In terms of commodity markets and competition, applicants state that the basic equipment of inland waterway firms is the towboat and the barge. They assert that the towboat is capable of pushing flotillas of barges containing any commodity,

and that barges—given a change in profit margins associated with the transport of specific commodities—can be shifted from one dry use to another, or from one liquid use to another. They conclude that, at the margin, the equipment used in barge transport is interchangeable, and assert that the existing degree of specialization of barges and towboats is not extensive and is typically dictated not by the characteristics of the barge market but by the varying management philosophies of barge carriers.

Applicants state that this broad market definition does not imply that every barge is substitutable for every other barge, or that every barge firm can offer immediate and effective competition for any commodity movement in any river segment. All that is required is that each barge operator's fleet be substitutable by the fleets (or some portion of the fleets) of potential or actual rival water carriers.

Applicants also state that private barge carriers belong, together with for-hire carriers, in any competitive analysis of barging, since private carriers are an important competitive force in the transportation of bulk commodities by barge, both by influencing prices barged by for-hire carriers and by disciplining the market to prevent for-hire carriers from charging supracompetitive rates.

(b) *Existing Barge Competition*

Applicants note that a competitive market has many participants in the market, none of which has any significant amount of market power, and that firms in a competitive market are therefore unable to exert any significant influence over the rates they charge, but instead must accept the prices established by the market.

Applicants assert that the barge industry is highly and effectively competitive today, because: (1) an examination of market shares of top firms and indices of market concentration (such as the Herfindahl-Hirschman Index) based on tonnage carried, ownership of towboat horsepower, and ownership of jumbo hopper barges all show the industry to be unconcentrated;

(2) size rankings of particular companies have changed considerably over time; (3) barge industry profits have not, on average, been higher than competitive levels; (4) smaller barge lines have been able to maintain market share and compete successfully against larger firms; and (5) testimony and statements of many industry leaders, including several WTA witnesses and spokesmen, assert that the barge industry is highly and effectively competitive.

In addition, applicants assert that, while they do not believe that barging of coal is a separate market, even looked at (incorrectly) in isolation, it, too, is effectively competitive. They base this conclusion on analyses of market shares and market concentration, changes in carriers' size ranking, lack of scale economies, and coal contract bidding.

(c) *Scale Economies, Other Entry (and Exit) Barriers, and Contestability*

Applicants argue that there are no significant barriers to entry in barging, and that the low level of "sunk" costs permits new firms to enter and leave the market quickly in response to any opportunity to earn supracompetitive (or even competitive) levels of return. They assert that capital costs are not barriers to entry, and are in any event relatively modest. Barges and towboats can be quickly purchased or chartered, and efficient secondary markets facilitate their sale when an incumbent seeks to leave the market. Ancillary services such as charter towing, barge rentals, and use of independent terminals, fleeting areas, fueling and repair facilities, all serve to hold down the capital costs of entering the market.

In terms of scale economies, applicants note that even if they did exist they would not serve as an entry barrier unless the optimum or efficient size of a firm were very large in relation to the total demand for industry output. They state that this is obviously not the case in barging, since many firms of various sizes compete in the industry, including a large number of smaller firms that compete effectively with larger carriers.

In arguing that there are no significant economies of scale that would give larger barge lines a cost advantage over smaller ones, applicants rely on: (1) barge costs being highly (over 90 percent) variable, so that barge firms experience minimal reductions in cost per unit as traffic volume increases; (2) both large and smaller barge firms providing long haul service, even though length of haul affects cost per mile; (3) the efficient tow size on inland waterways allowing smaller barge lines to operate efficient sized tows, even though tow size affects costs; (4) effective entry from smaller operators; (5) larger firms, on average, maintaining, but not gaining, market share of tonnage, horsepower ownership, jumbo hopper barge ownership, and coal tonnage (If larger firms were more efficient than smaller firms, they would presumedly exploit this by gaining market share through power rates and/or by earning monopoly profits. They have done neither.); (6) D.C. Boger's testimony on behalf of applicants that "my dissertation does not support Professor Kahn's conclusions," even though WTA witness Kahn relied in large part on the doctoral dissertation of Boger to conclude that there were significant scale economies in barging.

III. Impact of the Consolidation on Competition

Applicants state that the framework for analysis of the competitive impact issues presented by both DOJ and DOT is generally consistent with their own. Under this framework, the critical inquiry is whether the consolidation would permit a combined CSX-ACBL to exercise enhanced market power in the water transport market, or whether the competitive nature of the barge industry is such that the existence of incumbents and potential new entrants would prevent the exercise of market power.

Applicants also state that an analysis of market share and market concentration in properly defined product and geographic markets is only the starting point for a competitive analysis. While low levels of concentration indicate competitive

markets, increases in concentration do not necessarily indicate reductions in competition, since other factors, such as easy entry from new or existing firms, can act to discipline price and service levels even in concentrated markets.

With this methodology as a guide, applicants analyzed a number of ways in which opponents asserted the consolidation would reduce competition. Arguments refuting these examples were generally based on applicants showings, discussed earlier, that barge markets are broad in scope in terms of geography and commodities, and that few scale economies and no significant barriers to entry or exit exist.

Applicants argue that a showing that CSX has market power over certain specific (rail) traffic flows is not sufficient to conclude that competition will be reduced by the control, since monopoly profits cannot be charged twice, at different stages in the chain of production. For the consolidation to reduce competition, applicants assert that market power must be created or existing market power enhanced, and that it is not sufficient to show that CSX currently has market power and therefore, absent other proof, can enhance it through vertical extension into the barge industry.

Applicants state that there are two limited circumstances, neither of which applies to this proceeding, where vertical consolidations can raise competitive concerns. First, these concerns may arise when existing barriers to entry can be augmented by some predatory practice, but these concerns are not relevant here due to the ease of entry and lack of entry barriers in the barge industry.

Second, the existence of (maximum rate) regulation preventing a monopolist from collecting all its potential profits could conceivably encourage vertical combination. However, applicants assert that this second concern is not an issue unless the combined entity obtains market power in both industries as a result of the consolidation, since, if one of the industries remains competitive after the consolidation, there will be a com-

petitive price for the service provided by the combined entity that will permit regulators to detect any excess transfer prices charged between the two entities. Applicants conclude that the competitive nature of the barge industry ensures that evasion of regulatory control could not succeed.

Applicants also discuss another argument, so called "rate scissors" discrimination contentions, alleged by opponents to reduce competition and based on the vertical nature of the consolidation. Applicants state that the theory underlying these contentions is that a consolidated CSX-ACBL would (1) adopt a joint rail-barge rate at current (or lower) levels, and then (2) increase the CSX rail rate to the river for "everybody," thus placing competing barge lines at a disadvantage. However, applicants assert that so long as the barge industry is competitive (or contestable), barge lines cannot earn more than their costs, including their capital costs; under these conditions, if the incremental cost of a competing barge line is lower than that of ACBL for the same movement, it will always be more advantageous for CSX if the shipper uses the services of the more efficient competing barge line.

Applicants note that while opponents have asserted the consolidation is primarily horizontal, the alleged competitive harms just discussed (claims of extending CSX monopoly power into barge markets through "rate scissors" techniques and other devices) are all related to the vertical relationships of CSX to ACBL and other barge lines.

Applicants also analyze two allegations of competitive harm resulting from horizontal aspects of the control. First, they deal with the allegation that elimination of CSX and ACBL as direct competitors will by itself result in reduced competition under section 11321(b).

Applicants assert that an affirmative finding of direct competition between CSX and ACBL under section 11321(a) is not sufficient for a finding of reduction of competition under section 11321(b). They reason that if the elimination of competition

between a consolidating railroad and a barge line were a reduction in competition that would doom a proposal under section 11321(b), then the provisions of that section authorizing the Commission to approve consolidations when it finds them to be in the public interest would be rendered a nullity.

Applicants state that barge markets would remain effectively competitive and/or contestable after the consolidation in spite of the elimination of direct CSX-ACBL competition. All the factors discussed earlier would still apply. Competition in barging would still take place within broad geographic and commodity markets, and there would be few scale economies and no entry barriers.

Applicants also assert that similar arguments made with respect to coal are flawed. Opponents argue that by eliminating direct CSX-ACBL competition for coal traffic the consolidation would lead to increased (horizontal) concentration and reduced competition in coal transportation. Applicants state that, first, as discussed earlier, coal is not a separable barge market; second, WTA witnesses Nathan and Kahn are wrong to include railroads' shares of coal movements under the Panama Canal Act, which stipulates analysis of competition "on the water route in question"; third, even accepting the market as properly including railroads under section 11344, WTA witnesses omit important competitive elements in the demand for coal transportation—western, minemouth, and trucked coal—that influence price and serve as competitive alternatives for coal consumers; fourth, it is appropriate to allocate intermodal (rail/barge) tonnage to the carrier making the end delivery—in this case the barge carrier—but that instead WTA witnesses have allocated this tonnage to the railroad, which is operating in its capacity as feeder to barge lines.

Applicants then go on to discuss what they view as the second horizontal argument: that even if the consolidation does not immediately reduce competition through a sudden increase in concentration, it will do so in the long run—by changing the cost structure of the industry, with CSX-ACBL taking

advantage of integration savings or large economies of scale and/or density, reducing the costs of CSX-ACBL significantly in relation to the costs of other carriers. Applicants state that this argument attempts to show that, even if the barge industry is now competitive, the consolidation would render it "monopolizable." Applicants state that the argument seems to be as follows: there are significant economies of scale and/or density in barging, as a result of which high volume barge lines have a significant cost advantage over small lines; CSX-ACBL would route traffic to ACBL and away from competing barge lines; such diversions would decrease ACBL's unit costs and increase those of its barge competitors; ACBL would thus reduce its rates while competitors raised theirs; and eventually other barge lines would be driven out of business, with ACBL's cost advantage enabling it to keep new competitors out of the market.

Applicants state that this argument suffers from two serious defects. First, CSX does not have the ability to divert very large amounts of traffic away from other barge lines to ACBL. In 1981 CSX delivered about 20 million tons to the river for onward movement by barge, and 18.7 million tons of this total was coal, representing just 13 percent of the 140 million tons of coal moving by barge on the inland waterways that year. Not all this tonnage is easily divertible to ACBL. Some was already moving via ACBL (1.7 million tons in 1981), some was moving to a utility that elected to use its private barge fleet, and other significant tonnage was moving via long term contract in conjunction with other barge lines. Applicants conclude that the most coal traffic that CSX railroads could even theoritically divert away from other barge lines to ACBL would be somewhat less than 13 percent of the total amount of coal moving on the inland waterways.

Second, applicants state that they have shown, as discussed earlier, that barging does not exhibit significant economies of scale and that traffic shifts, as discussed above, would not create

a significant cost advantage for ACBL relative to other barge carriers. Applicants argue that if a shift of a few million tons of coal to ACBL from its competitors was enough to change the average costs of all involved firms in a significant way, then the barge industry as it exists today, with both very large and smaller carriers, could not exist. Applicants go on to state that if significant economies of scale and/or density existed, than ORCO, with 50 percent more coal tonnage than its nearest competitor, would at this moment be in the process of monopolizing the barging of coal on the inland waterways (assuming, for the sake of analysis, that coal barging is a separate market).

We are in basic agreement with many of applicants arguments and conclusions that relate to assessing the impact of CSX control of ACBL on competition. Here we briefly summarize and discuss those points where applicants are in error.

First, applicants are incorrect in concluding that ACBL and CSX do not compete. They have defined "competition" under section 11321(a) in too narrow a fashion. For example, we have concluded that competition takes place between common points that cannot be defined as a specific dock or waterside facility. Rather, a "point" includes the commercially feasible gathering and distribution areas along the waterway. We have found concrete, specific examples in the record to demonstrate that CSX and ACBL have actively and competitively sought the same traffic of specific shippers for movements between common points.

Second, opponents are correct that applicants have not completely and correctly adjusted all their data sources used to show that barging is effectively competitive. For example, some concentration statistics may have included data that are inconsistently adjusted for affiliated carriers or that represent some barge firms that are not primarily engaged in line haul carriage. Nonetheless, applicants have submitted a diverse set of data from a variety of sources. They do not key their analyses or conclusions to any one data source. For example, in

examining barge industry concentration and the potential for existing effective competition and scale economies, they present data from five separate sources that are based on three distinct measures of concentration (tonnage, hopper barge ownership, and operational towboat horsepower). All data point to the same conclusion: barging today is not concentrated, and is a highly competitive industry that does not exhibit significant economies of scale.

DEPARTMENT OF JUSTICE

Department of Justice (DOJ) did not participate in the evidentiary portion of this proceeding and takes no position on whether the facts warrant authorization of the consolidation. In its brief, DOJ addresses only issues surrounding the interpretation of the term "competition" as it is used in The Panama Canal Act (49 U.S.C. 11321).

In discussing the "may or do compete" standard of section 11321(a), DOJ notes the following:

(1) Even with many common service points, the Commission has recognized in the past, and DOJ concurs, that a barge and a rail carrier may not compete because of the nature of the traffic, service differences, prevailing rate differences, or the extreme circuity of either the rail or the water routing.

(2) If a rail and a water carrier compete over the entire movement or just a portion of the movement between an origin and a destination, they should be considered to be competing for movements between common points.

(3) Source or geographic competition may take place between a rail and a water carrier at a (single) common interchange point. Whether or not a common interchange point indicates and end-to-end or a competitive relationship between two carriers is a factual issue the Commission should properly analyze.

In discussing the standard under section 11321(b) ("will still allow competition, without reduction, on the water route in question"), DOJ notes the following:

(1) In concurring with the Commission in Decision Nos. 3 and 7 in this docket, DOJ states that the product subject to competitive analysis is transportation of a commodity, the participants are all substitutable transporters of the commodity regardless of mode, and the geographic aspect includes the traffic lanes to commonly served points.

(2) Again concurring with the Commission's announced change of focus (as stated in Decision No. 3) from that in *John I. Hay* (1962), DOJ states that the *John I. Hay* decision improperly emphasized harm to competitors and not harm to competition.

(3) An acquisition can be thought of as reducing competition if it creates or enhances market power or facilitates the exercise of market power by a firm (unilateral market power) or firms (collusion). A firm(s) with market power can for a significant period maintain a selling price that is above the level that would prevail if the market were competitive. It is not relevant whether one or both firms possess market power prior to the consolidation. As long as market power is not enhanced, a combination will not reduce competition.

(4) In general, lack of entry barriers will preclude the exercise of market power. An increase in market power (and reduction in competition) can arise when an acquisition reduces the number of competitors (that is, increases market concentration) and increases the size of the combined firm, since the probability of implicit or explicit coordination among firms may increase as the number of firms in the market decrease and the firms come to recognize their interdependence. However, for this adverse competitive effect to occur, the resulting market must be highly concentrated *and* entry by new firms must be difficult, since if entrants can expand output quickly, collusion will most likely not successfully raise prices. Thus competition sufficient to maintain competitive price and service levels in a market can be provided by actual participants (as evidenced, for example, by low levels of market concentration) or by "contestors" not currently serving the market.

We are in general agreement with DOJ's proposed methodology for interpreting and assessing competition and competitive impacts of rail/barge combinations under the Panama Canal Act. We disagree with WTA's assertion that DOJ has proposed a "monopolization" standard more appropriate to section 2 of the Sherman Act than to section 11321(b). As long as a rail/barge combination does not lead to higher prices or lower service levels than those that would prevail absent the combination (i.e., as long as it does not create, enhance, or facilitate the exercise of market power) it will not reduce competition.

One point of contention is whether source or geographic competition between the combining rail and barge firms at a single common interchange point should be considered in applying the "may or do compete" test of section 11321(a). Since we have shown direct competition between ACBL and CSX by looking at traffic flows between common points, and thus did not have to rely on this proposed DOJ standard, the issue for the case at hand is moot.

DEPARTMENT OF TRANSPORTATION

DOT's analyses and conclusions are in general parallel to those we have adopted in our decision. Here, we briefly summarize DOT's arguments.

I. Direct CSX-ACBL Competition

DOT states that under the "may or do compete" standard of section 11321(a) it is not sufficient simply to show that the railroad and barge line serve the same geographic area, and that attempts to define the relevant market under the broad geographic and product market criteria employed under the antitrust laws are not proper under this section. DOT concludes that use of the narrow interpretation of point-to-point competition for purposes of review under the Panama Canal Act is amply supported by the legislative history of the statute.

Nonetheless, DOT concludes that, while the matter "is not entirely clear", CSX and ACBL "do or may compete for traffic" under section 11321(a).

II. Impact of the Consolidation on Competition

DOT's analysis of the record in this proceeding leads it to conclude that the barge industry is competitive, since barging is characterized by relative ease of entry into new product and geographic markets for existing and new carriers; the close substitutability of one barge firm's services for another's; the power of shippers to direct large volumes of traffic to different transportation modes or carriers; and the ability of shippers to enter into private carriage to meet their own transportation needs.

Because the barge industry is so competitive, DOT concludes that CSX-ACBL will have no incentive to reduce rates below cost in an effort to drive competitors out of the market. This would not be profitable in the short or long run, since actual or potential competition from other barge firms would continue to keep rates at competitive levels and prevent CSX-ACBL from recovering losses they sustained in reducing prices. Therefore, in situations where CSX and ACBL may provide competing parallel service, DOT argues that they would have no effective means of excluding or reducing competition on the river; shippers will continue to have available alternate transportation services from other water carriers at competitive price and service levels.

Furthermore, DOT asserts that CSX-ACBL will not be able to vertically foreclose other independent water carriers from competing with the combined firms. For most commodities, CSX delivers very little traffic to the river. Independent water carriers will, therefore, continue to have the ability to compete since alternate sources of supply, which do not require handling by CSX, will continue to be available.

DOT states that coal and phosphate rock/phosphatic chemicals are the only two commodities that CSX brings to the water in any significant volumes. DOT concludes that competition for coal will not be reduced. Substantial volumes of coal will continue to be available from non-CSX sources. In addition, DOT argues that even if all CSX originated coal traffic now interchanged with barge lines were diverted to ACBL, the ability of other water carriers to compete would not be adversely affected. It argues that this is true because the evidence does not demonstrate that there are significant economies of scale or traffic density for barge transportation that would cause the costs on remaining traffic of competing carriers to increase to noncompetitive levels.

DOT also concludes that, with respect to the phosphate rock/phosphatic chemical trade from Tampa, FL to points on the Gulf Coast, there are other competitive forces in the market which presently constrain CSX's pricing and that these forces are likely to continue to affect rates and services after the combination. However, while DOT does not recommend that any condition be placed on this consolidation, it urges the Commission to continue to monitor circumstances in this market.

As a result of these analyses, DOT supports approval of the proposed control application of ACBL by CSX, stating that the proposal satisfies the statutory criteria governing railroad acquistions of water carriers. Competition will not be reduced as a direct result of the acquisition. In addition, the enhanced ability of CSX and ACBL to coordinate their operations and marketing will allow them to offer the shipping public an improved intermodal service. It will also remove the inherent deterrent to coordination that exists when one carrier must yield traffic and profits to another carrier in order to effect a movement. DOT concludes that rail ownership of barge lines is consistent with the National Transportation Policy and that approval of the acquisition is in the public interest.

USDA

USDA is most concerned in this matter with the movement of agricultural commodities and states that, at least as far as grain is concerned, competition effectively begins at the farm or local elevator. Since CSX and ACBL exhibit substantial overlap of operating territories, encompassing many farms and local elevators, USDA alleges that the proposed consolidation would reduce competition through the direct lessening of competition that would occur on those movements where CSX and ACBL are currently in competition with each other. USDA has supplied detailed testimony that indicates current active competition between CSX and ACBL.

In addition, USDA states that the combination could reduce competition by leading to outright anticompetitive practices that would unfairly enhance the consolidated entity's market share. For example, USDA asserts that CSX and ACBL could act to drown competition through use of cross subsidies between the two jointly owned modes, and that CSX could also unfairly favor shippers using ACBL by, for example, "delays" in supplying rail equipment for shipments destined to other water carriers.

The arguments and assertions used by USDA expert witnesses in reaching these conclusions concerning reductions in competition are also used by WTA (and so noted by USDA). These include the alleged ability of railroads to exercise a substantial degree of market power over shippers. Other factors are discussed which together determine the nature of barge operations and the degree of prevailing competition, such as market segmentation. USDA contends that competition takes place only among large, for-hire line haul carriers operating in specific river segments and hauling specific commodities. USDA also asserts that barging exhibits scale economies and is capital intensive, leading to alleged entry barriers.

Since these allegations are also made by WTA, our analysis of USDA's general economic agruments will be subsumed within our discussion of WTA's competitive analysis.

WTA

I. Direct CSX-ACBL Competition

WTA states that the evidence of competition between CSX and ACBL is pervasive. Both carriers transport the same commodities and serve innumerable common origins and destinations. They vigorously compete for traffic moving between common points (however defined), their routes parallel each other, and they compete daily for traffic moving all along the ACBL-served waterways and for traffic moving to, from, and through various inland and waterside cities, towns, and villages and to and from individual shippers. Thus, WTA asserts that CSX and ACBL are important participants in the daily competition that exists between barge lines and railroads and concludes that if they do not compete, then no barge line competes with CSX or any other railroad.

In addition to a "general case" (*i.e.*, if CSX competes with any barge line it must compete with an industry leader such as ACBL), WTA cites extensive data and specific examples as evidence that CSX and ACBL directly compete. This evidence encompasses facts concerning: (1) the overlapping service areas of CSX and ACBL, including common points and common facilities served directly or in modal combination; (2) statistical data showing movement of traffic to, from, and between states, metropolitan areas, Bureau of Economic Analysis areas (BEA's), Bureau of Mines coal districts (BOM's), rivers, and river segments, as well as illustrative movements for specific customers; (3) bids and solicitations; (4) CSX documents and statements acknowledging actual and potential competition with barges both generally and for particular commodities; and (5) testimony from shippers and public bodies concerning direct CSX-ACBL competition.

II. The Barge Industry Today

(a) *Market Segmentation*

WTA states that there are three types of companies operating in the barge industry today; service companies, such as those that perform harbor service; local companies, that provide short-haul service in a narrow geographic range; and line-haul companies. Some line-haul companies are private carriers, and WTA asserts, since they primarily serve the interests of their shipper affiliates, that they do not provide effective competition to for-hire carriers. In addition, WTA asserts that the existence of significant scale economies in barging preclude most smaller for-hire line haul companies from offering effective competition to larger firms. Therefore, WTA concludes that the analysis of the competitive impacts of this combination on the barge industry should focus solely on larger for-hire line-haul carriers.

Furthermore, WTA asserts that coal, grain, and liquid (chemicals and edible oils) traffic are the three primary commodity groups moving by barge, and that these groups differ significantly in terms of patterns of movement, the methods and equipment used, and customer and market requirements. WTA states that as a result of these differences the economic and efficient line-haul movement of each commodity group requires different types of barges and, because individual waterways have distinct navigational characteristics, different sized towboats are used depending on the river or waterways involved in a movement. WTA states that the record establishes that, as a result of these factors, barge lines have patterns of concentrated geographic focus to their operations (often operating predominantly on certain rivers and not on other waterway segments) and specialize in hauling certain commodities, so that only a small number of barge lines have the equipment, resources, and ability to operate throughout the system and to compete effectively for movement of the three

basic commodity groups. Thus, WTA states that the barge industry is composed in large measure of firms that limit their service to segments of the waterway system and that specialize in limited types of cargo, and concludes that barge transportation is highly structured, involving a limited number of competing for-hire carriers, most of which are specialists in terms of commodities carried and/or geographic areas served.

As we discussed under the Market Definition heading in the Competition section of the body of our decision, private barge carriers compete directly with for-hire carriers and should be included in any market analyses assessing the competitive impact of the combination. As also discussed in that section, barging does not exhibit significant scale economies, and many smaller firms provide effective competition for larger firms.

Lastly, there is little to keep firms that operate in one segment of the MRS/GIW from easily expanding operations into other geographic areas, should profitable opportunities arise. In addition, there are at most minor impediments to the use of existing equipment across all commodity groups.

Therefore, WTA is in error in omitting private carriers and smaller for-hire line haul carriers from market analyses and in examining barge competition within narrow geographic and commodity markets.

(b) *Market Concentration*

WTA's conclusion that there is extreme market segmentation in barging guided it's analysis of data provided by DOT and the Corps of Engineers. WTA looked at barge firms' market shares for specific commodities (often looking at commodity group distinctions finer that the three discussed earlier) and river segments (typically breaking the MRS-GIW into at least five separate segments; an exception is Kahn's analysis of barge and rail eastern coal movements to all waterside counties). Private carriers were omitted from the analysis as were, at times, smaller for-hire barge firms.

This analysis of a narrowly segmented barge market appears to have led WTA to conclude that barge transport is "oligopo-

listic." Its analysis showed that a limited number of for-hire firms provide a preponderance of the barge transportation of the major commodities along the principal rivers. Those barge lines are the ones that have a sufficient amount of the proper equipment to carry a particular commodity, coupled with a recurrent pattern of frequent service in the geographic areas where traffic in that commodity moves.

WTA's use of inappropriately narrow barge markets (segmented by detailed commodity and geographic boundaries and excluding private carriers and, at times, smaller for-hire line haul carriers) led to submission of artificially inflated indices of industry concentration and the erroneous conclusion that barge transport today is "oligopolistic." Even WTA's economic witness, Kahn, testified that, "Although there is a great deal of specialization among barge companies, both geographically and by major bulk commodity, barging is competitive."

The evidence shows that broadly defined barge markets exhibit low levels of concentration, and that barging today is effectively competitive.

(c) *Scale Economies and Entry Barriers*

WTA asserts that barging exhibits economies of scale and density and other entry barriers so that new firms find it difficult to enter the industry and existing firms are not able to offer effective competition outside their immediate areas of commodity and geographic specialization. WTA states that entry into barging is not easy, but takes many years of effort. The practical and economic barriers to enter into barging enumerated by WTA are the following: (1) the requirement of very substantial capital investment to acquire the large fleet of floating equipment required for significant participation in line-haul carriage; (2) the substantial advantage enjoyed by established carriers who possess an existing base of operations, with attendant economies of density and scale, and who are thus able to operate at significantly lower costs (WTA notes that density within a traffic pattern is achieved by obtaining backhauls and complementary parallel hauls and permits a

carrier to operate efficiently and economically within its pattern); and (3) the need to establish a reputation for reliable service in order to win customer acceptance.

For example, after stating that a carrier's equipment necessarily relates to its commodity specialty and its area of geographic operation or pattern, WTA asserts that the evidence shows it takes at least 300 barges and 5 boats to be an effective competitor for movement of coal on the Ohio River, and 400-600 barges and 11-16 boats to compete effectively to carry grain on the upper and lower Mississippi River. Thus, WTA concludes that in the competition for any major movement of a given commodity in a given geographic market, only a few barge lines have the competitive presence, the density and scale necessary to compete effectively. Everyone else is forced to bid at a considerable disadvantage with respect to the competing incumbent carriers.

As discussed more fully in the body of our decision, evidence shows that any economies of scale and/or density that may exist in barging are available to carriers at a relatively low level of operation, and that there are no other regulatory, capital cost, or other barriers to entry by new firms into barging. Furthermore, existing firms can effectively compete outside of their current traffic patterns when profitable opportunities arise. Therefore, WTA is incorrect in concluding that barging exhibits significant economies of scale or other entry barriers.

III. Impact of the Consolidation on Competition

(a) *How to Measure Whether There Will Be "Competition, Without Reduction"*

WTA asserts that competitive standards proposed by DOJ for application to 11321(b) are in error. In its brief, DOJ stated:

> The Commission should examine the CSX/ACBL acquisition to determine whether the transaction will: (1) increase the likelihood that the combined firm will dominate a market and charge supracompetitive prices in that market; or (2) increase the likelihood of explicit of tacit collusion among the remaining firms that will result in prices above the competitive level in a market.

WTA asserts that DOJ has confused "competition, without reduction" under the Panama Canal Act with the concept of "monopolization" under section 2 of the Sherman Act. WTA states that the test proposed by DOJ requires, to deny an application, the creation of a dominant firm controlling prices in the market through collusion, and that this is not the test under the Panama Canal Act. WTA goes on to state that the suggestion that the Commission must find that the combined entity would be able to exert monopoly power, defined as the power to control the price and competition in the market, is wrong.

WTA also asserts that, in measuring competitive impacts of this consolidation, the theory that ease of entry is a panacea for high concentration is erroneous, and that the issue of whether there are significant barriers preventing entry into the barge industry or whether such industry is competitive is of no consequence in determining whether a transaction may be approved under the Panama Canal Act. WTA goes on to state that the purpose of the statute was to effectuate a complete separation of the rail and water modes in order to preserve and promote competition between them, and any claim that there can be no reduction in competition if there is ease of entry would effectively destroy the purpose of the Panama Canal Act.

The DOJ standard, as we interpret it, is the correct one to apply to assessments of whether a consolidation will lead to "competition, without reduction" under the Panama Canal Act. As long as a rail/barge combination does not lead to higher prices or deteriorated service, as measured from competitive levels, the consolidation will not "reduce competition."

WTA errs in stating that the DOJ test would require the creation of a dominant firm to find "reduced competition" under section 11321(b). The test is equally applicable to a situation where existing competitive firms could achieve modest market power. Prices need rise only above competitive levels, not to levels consistent with monopoly.

Ease of entry is not a panacea, but certainly is one important factor that can mitigate against the anticompetitive effects of

increased concentration caused by a combination. In any standard analysis of the competitive impacts of a proposed consolidation of transportation firms, increased concentration or market share is not alone dispositive of whether the combination would require competition. The competitive strengths of and opportunities for, existing new carriers, the existence of alternative modes or routes of transportation, and the availability of alternate sources of supply may offset the effects of increased market share.

(b) *Will the Combination Reduce Competition*

WTA asserts that the consolidation will reduce competition by eliminating CSX and ACBL as direct competitors, by adversely affecting the ability of independent barge firms to compete with CSX/ACBL and among themselves, by permitting CSX to evade the Commission's regulation of maximum rail rates on rail traffic that is part of rail/barge movements, and by adversely affecting competition for specific commodities (such as coal) and/or in specific geographic areas.

1. *Elimination of Direct Competition Between CSX and ACBL*

As discussed earlier, WTA has shown that there now exists some direct competition between CSX and ACBL and that the consolidation is, therefore, in part a horizontal combination of two firms. WTA notes that Nathan, one of its expert witnesses, had quoted CSX witness Baumol as stating that by definition a horizontal acquisition "...takes two competing firms and transforms them into one" and that Nathan goes on to claim that "...by definition, this act reduces competition." WTA strongly agrees, and asserts that the uncontradicted evidence of competition between CSX and ACBL leads inexorably to the conclusion that a reduction in competition will result from the removal of the nation's leading barge line as an independent competitor of CSX.

In a proposed rail/barge consolidation analyzed under the standards of the Panama Canal Act, a showing under section 11321(a) that the two carriers "may or do compete" for traffic is not, by itself, sufficient to demonstrate that the combination

would "reduce competition" under section 11321(b). If the elimination of competition between a consolidating railroad and a barge line was by itself a sufficient reduction in competition to require disapproval of the proposed combination under section 11321(b), then the provisions of the second section authorizing the Commission to approve such consolidations, when we find them to be in the public interest, would be rendered a nullity.

Because of the broad nature of barge markets and the lack of significant scale economies or other entry barriers, elimination of the limited direct competition between ACBL and CSX would not reduce competition on the water routes in question.

2. *Adverse Effects on the Ability of Independent Barge Lines to Compete Effectively with CSX/ACBL and Among Themselves*

WTA asserts that the combination will reduce competition by adversely affecting the ability of other barge lines to compete among themselves or offer effective competition to CSX/ACBL. WTA states this will occur because of the following factors: (1) advantages conferred on CSX/ACBL by its disparate size vis-a-vis the rest of the barge lines; (2) the potential exclusion of independent barge lines from substantial quantities of CSX-related inland traffic; and (3) the ripple effect created by the lost traffic on the essential operations of the independent barge lines. WTA states that the techniques available to assure the flow of traffic to ACBL involve exercising control over routings by various means, including: (1) exploitation of traffic relationships; (2) selective use of "confidential" contracts; (3) rate discrimination and manipulation; and (4) service discrimination.

WTA predicts that as a result independent barge operators will no longer be able to compete with ACBL because ACBL will possess assets, have friendly access to traffic from a pervasive rail system, and, in general, enjoy the market power and control over rates derived from CSX. WTA asserts that, since independent barge lines would be eliminated, as a practical matter, from effectively competing with ACBL for CSX-

related traffic, these independent barge lines would be weakened by the loss of revenue from this traffic and by disruption in traffic density and patterns of service. This would in turn lead to decreased efficiency and higher unit costs, thus making the independent barge lines less effective competitors of ACBL, CSX, and other railroads, and adversely affecting both rail-barge competition and intrabarge competition.

Under this WTA scenario, independent water carriers will be weakened and, then, eliminated as they are excluded from traffic, reducing the level and intensity of competition. ACBL, already the nation's largest inland water carrier, will substantially increase its market share and power at the same time competition will be reduced among independent water carriers. As a consequence, WTA asserts the transaction will disrupt the delicate competitive balance between rail and water carriers and harm the public.

WTA's scenario is incorrect for two primary reasons. First, it assumes that CSX railroads have the ability to divert very large amounts of traffic away from other barge lines to ACBL. In 1981, over 90 percent of the traffic CSX brought to the river for onward movement by barge was coal (18.7 million tons), and this represented only 13 percent of the (140 million tons of) barged coal in that year. Further, not all of that coal is potentially divertible to ACBL. Some CSX coal tonnage (1.7 million tons in 1981) was already carried by ACBL and other coal tonnage was tied to long term contracts in conjunction with other barge lines or was sent to a utility that prefers using its own private barge carrier.

Second, as noted previously, barging exhibits limited economies of scale that are dissipated at fairly low levels of operations. Any traffic shifts originated by CSX to ACBL would not create a significant cost advantage for ACBL relative to other barge firms.

(3) *Evasion of Commission Regulation of Maximum Rail Rates*

WTA states that CSX will be motivated to use the consolidation to evade the residual maximum rate regulation conferred on the Commission by the Staggers Act. Under this alleged scenario, once CSX becomes "revenue adequate" and drives independent barge lines out of business, it could shift revenues from rail to barge, leaving through rates unchanged, and thereby render it revenue inadequate on paper. As long as the rail rate on the intermodal shipment remained compensatory it would not be subject to (minimum rate) regulatory oversight. It then assumes that rates to captive CSX rail shippers on the rest of its system could in these circumstances be raised, constituting an adverse competitive impact.

We believe that the evidence demonstrates that barging will remain competitive and independent barge lines will not be driven from the markets. Therefore, CSX would not be able to shift revenues from rail to barge because ACBL's rates cannot rise above existing competitive levels without it losing significant market share.

(4) *Adverse Competitive Impacts Related to Specific Commodities and/or Specific Geographic Areas*

WTA has claimed, as discussed earlier, that barge markets are highly segmented, so that competition takes place for specific commodity movements within specific geographic areas, with firms operating within one commodity/geographic area market segment offering little effective competition to firms operating elsewhere. As a result, WTA has presented analyses that allege that the consolidation will increase concentration, weaken independent barge lines, and reduce competition for all movements of specific commodities (coal, farm products, liquids, fertilizer products, and other commodities) and for specific or geographically constrained movements of specific commodities (*e.g.* coal to utilities, TVA, Florida, or for export).

While barge markets should not be segmented into separate commodity classes, we have extensively examined the impact of the consolidation on barge transportation of coal, agricultural products, and fertilizer. Our analyses demonstrate that the combination will not reduce competition with respect to the transportation of these commodities.

NATIONAL COAL ASSOCIATION (NCA)

NCA represents more than 200 firms. Its members are primarily coal producers, and together they account for about sixty percent of 1983 U.S. coal tonnage. NCA's interest in this proceeding stems from the fact that railroad and water transportation constitute the only two practial modes available for long-haul coal movements, and that transportation costs today typically represent 25 to 50 percent of coal's domestic delivered price.

NCA disputes the applicability of the "contestability" theory to this proceeding. It argues that while applicants claim significant efficiency benefits from consolidation that could not be achieved by a rail and a water carrier as uncombined entities, the very strong assumptions of the "contestability" theory assume away the "transactions costs" that are the purported source of the alleged operating efficiency gains from the merger. NCA concludes that the theory of contestable markets cannot be reconciled with the argument that market imperfections would be reduced by the consolidation.

NCA also alleges that if there are substantial efficiency benefits to be gained as a result of the consolidation, then these advantages will result in an "economies of scope entry barrier." Barge firms that are not affiliated with a rail carrier will be unable to effectively compete with the newly efficient CSX/ACBL, so that the consolidation will cause an allegedly "contestable" barge market to become a "noncontestable" barge market, with a multiservice monopoly established by the combined firm.

NCA asserts that when applicants state that the proposed combination cannot be anticompetitive they really mean that, even if CSX/ACBL (and likely other rail/barge consolidations to follow) could utterly suppress an independent barge mode by denying these uncombined carriers the traffic needed to survive, the result would not lead to a reduction in competition because the true source of monopoly power in freight transportation is rail market power, and here CSX already has all of this there is without the consolidation. NCA states that proponents assume, without foundation, that the resulting loss of an independent barge industry is without value to the shipper because it will pay the same total high rate anyway.

NCA also lists a number of specific competitive problems it contends will result from the consolidation:

(1) CSX could use contracts to discriminate against intermodal coal shipments in rates and service when ACBL is not the water carrier.

(2) Because of parallel movements of CSX and ACBL along the Ohio River, the consolidation could lessen competition for eastern coal and simultaneously lessen competition for western coal carried east by non-CSX railroads and barges on the Mississippi and Ohio Rivers.

(3) There would be a lessening of competition among deep draft ports for export coal, since CSX uses Baltimore Harbor and Hampton Roads for exports while ACBL utilizes New Orleans.

(4) CSX control of Louisville and St. Louis terminals will reduce river competition.

(5) Completion of the Tennessee-Tombigbee Waterway will create new CSX-ACBL parallel routes from Kentucky and Tennessee to the Gulf.

These specific allegations can be summarized as follows. First, the ability of CSX to deliver traffic to or otherwise favor ACBL (through rate discrimination, control of river terminals, etc.) will lead to reductions in competition. Second, elimina-

tion of existing direct competition between ACBL and CSX will lead to a reduction of competition under section 11321(b). We previously addressed the same general economic arguments in our analysis of the WTA position and will not repeat that analysis here. However, we will address those NCA arguments which are not treated in our earlier analysis.

NCA has asserted that any substantial efficiency benefits that accrue to ACBL and CSX as a result of the control will lead to the creation of an "economies of scope entry barrier," since non-rail affiliated barge lines would be unable to compete with the more efficient ACBL, and that this would lead to a reduction in competition under section 11321(b). This is in error for two reasons. First, the applicants have stated that the consolidation would permit CSX and ACBL to achieve significant efficiencies in their operations and reductions in their costs, but that savings to be achieved are not enormous when compared to those attained in some recent rail consolidations. Second, and most important, since the costs of most independent barge lines would not rise even with significant traffic diversion (due to absence of scale economies), even if CSX-ACBL were able to achieve a "monopoly" position in the barge market, they could do so only so long as they held their rates to the new efficiency created low cost levels. Any attempt to raise ACBL's rate higher than existing rates would lead other barge lines to re-enter markets. Thus, under NCA's proposed scenario, the shippers and public would benefit from any cost reductions while the "monopoly" position was being attained (through lower rates), and could not be injured by any subsequent increase by the consolidated company in barge rates above existing levels. The explanation we have given here is similar to the reasoning used to explain why predation would not be a profitable strategy for CSX-ACBL to follow.

TVA

In assessing whether or not CSX and ACBL do or may compete, TVA states that competition takes place for movements between "common points" when that term is given a broad meaning that comports with economic reality. It notes with approval that in the past the Commission has held that such common points include terminals, ports, cities, States, and regions.

Using this broad definition, TVA asserts, from firsthand knowledge, that CSX and ACBL actively compete against one another. For example, the coal movement to TVA's Cumberland plant was awarded as a 20 year/120 million ton contract to ACBL in head-to-head competition with CSX. This contract currently accounts for more than 25 percent of ACBL's coal traffic. Neither ACBL nor CSX could serve the origin mine at the time the two carriers submitted their bids to TVA. (The ACBL bid called for an 11-mile conveyor belt to reach the mine, while the CSX bid called for construction of a 21-mile rail spur). TVA contends that this lack of a connection by ACBL or CSX to the origin mine, at the time of their bids, is not sufficient to validate applicants' arguments that such cases are not examples of direct CSX/ACBL competition. TVA notes that both CSX and ACBL also bid or offered rates for coal movements to its Gallatin, Johnsonville, Paradise, and Widows Creek plants.

TVA goes on to state that, since ACBL currently competes with CSX and acts to constrain the use of CSX's considerable market power, one way the combination would reduce competition would be by removing ACBL as a competitor to CSX. With the median number of barge lines bidding on TVA coal movements being only four, TVA states that it can ill afford to have ACBL come under the control of CSX, the dominant coal carrying railroad.

However, TVA asserts that the most significant anticompetitive effect of the consolidation is the potential ability to monopolize the barge industry. While TVA states that the

barge industry today is generally competitive, it notes that, to a significant extent, barge transportation of various commodities is dominated by a few carriers such as ACBL. Such dominance suggests to TVA that the barge industry can be monopolized. This could come about as a result of CSX's ability to direct traffic from other barge lines to ACBL. TVA states that, in light of CSX's position as the leading eastern railroad, such a traffic diversion would by itself have a significant, adverse impact on competitive choices. This reduction in competition would be compounded by the disruptive effects diversions would have on traffic patterns and densities of other barge lines, adversely affecting their ability to compete with CSX and ACBL.

Thus, TVA's arguments concerning consolidation-related reductions in competition center on two main points. First, having shown that CSX and ACBL directly compete for certain traffic (under the section 11321(a) standard), TVA asserts that this direct competition is so significant that its elimination by the consolidation implies a reduction in competition under the section 11321(b) standard. Second, TVA asserts that the potential diversion of CSX-originated traffic to ACBL will also lead to reduced competition. These same two assertions are also made by WTA. Our reasons for rejecting these arguments, which are included in our analysis of WTA's position, are equally applicable here and need not be repeated.

[ICC DECISION] APPENDIX C-1

BARGE MARKET ANALYSIS

In this Appendix we assess opponents' assertions that the barge industry is characterized by discrete market segments, associated with movements of particular commodities on particular rivers, requiring specialized equipment appropriate to each type of move. We examine these assertions first as they relate to market segmentation by geographic area and second, as they relate to market segmentation by commodity. We con-

clude that there is little to keep firms that operate in one segment of the Mississippi River System and the Gulf Intracoastal Waterway (MRS/GIW) from easily expanding operations into other geographic areas, should profitable opportunities arise. We also conclude that there are at most minor impediments to the use of existing equipment across all commodity groups. Thus, the barge industry is a single economic market, and any assessment of the competitive impacts of this consolidation should properly focus on the entire barge industry.

a. *Market Segmentation by Geographic Area*

There now exists a standardization of barges and towboats that makes all but the most specialized equipment interchangeable on most of the MRS/GIW. Opponents err in asserting that barge firms operating in one segment of the system find it difficult to expand operations and gain profitable traffic on other segments of the system.

For barges, this interchangeability is due primarily because barges are built to maximize the space in the principal locks of the MRS/GIW. Therefore, most barges are of standard sizes and can be used throughout the system. Virtually all of the inland waterway system is maintained for most of the year by the Corps of Engineers at a 9-foot project depth, which is the loading norm for open hopper barges, covered barges and liquid barges. Barges move freely throughout the system, with the exception of the Pittsburgh area, where the lock system requires use of 26-foot wide "stumbo" barges.

For towboats, the situation is somewhat more complicated. While barges are relatively interchangeable in use over the entire waterway system, towboats are somewhat more limited in their pratical use. The minimum size of a towboat for a particular use depends upon the physical characteristics of the particular portion of the waterway, the water conditions involved (such as depth and current) and the number of barges being moved in a tow.

There are three broad categories of tows. First, there are workboats and fleetboats. These have up to 1,500 horsepower and tend to be utilized for non-line haul work, such as movements within harbors or at terminals. Second, there are single or twin screw line-haul boats used with tows of up to 15 barges in all segments of the MRS/GIW except the lower Mississippi where the possibility of larger (and more efficient) tow sizes creates the requirement for more powerful towboats. Third, there are the high horsepower twin or triple screw tows used on the lower Mississippi and Ohio Rivers.

Opponents disagree with this assessment that there are only three towboat size classes. One opponent's account of towboat requirements and river restrictions postulates the need for a barge carrier to own towboats in over half a dozen different horsepower classes in order to run an efficient operation on the various river systems.

However, carriers only require a small number of towboat sizes to operate effectively. They use the towboats they own and when the need arises they buy other new or used boats which are flexible enough to handle their present traffic and other business they reasonably expect to handle. For short term needs, they hire outside towing and avoid unnecessary purchases. For example, ACBL, an effective competitor in all river segments it participates in, buys some towing on all rivers to augment its existing towboat power requirements or expedite barge movements. Most carriers do.

Thus, while there is some diversity in tow and towboat sizes on the rivers, we conclude that management strategies, not equipment types, determine how equipment is acquired and used. This explains how and why carriers use a wide variety of towboat horsepower to do similar work by varying the number of barges pushed and horsepower developed. For example, in the Ohio River coal trade, Crounse uses 1,800 horsepower towboats, rather than the 4,800 and larger horsepower towboats used by ACBL, Dravo Mechling, and M/G. Crounse

does so by operating a larger number of boats on a frequent basis on a short stretch of the river. Crounse requires more (small) boats than other operators, and these differences in operating styles apparently balance out, as firms with both operating philosophies are effective competitors on the Ohio River.

Thus, no single pattern exists for the use of towboats on the inland waterway system, and towboats of varying sizes can be operated efficiently on different inland waterways segments. While efficiency can be maximized in many river segments by carefully tailoring the utilization of towboats of differing horsepower to the peculiar characteristics of a specific waterway, *i.e.*, current speed, lock size, etc., and to the cargo being carried, towboats of different horsepower can and are used in the same river reaches. Other alternatives are also available to barge operators. For example, many smaller line-haul tows "turn-around" in the Cairo, Illinois area after transferring barges to and from higher horsepower towboats working the lower Mississippi.

In rail mergers, we alleviate competitive harms in geographic submarkets by granting trackage rights. In barging, the Government provides the rights-of-way, and so all barge firms have the equivalent of trackage rights everywhere (subject to Commission approval of operating authority for the carriage of regulated commodities). New and existing barge companies can easily expand in new areas. Barges and towboats can go literally anywhere in the inland waterway system; most barge equipment is relatively interchangeable throughout the system. We conclude that while barges and tows do not have complete and instantaneous geographic mobility, they have sufficient mobility to effectively discipline barge price and service levels in diverse sections of the Mississippi River System and the Gulf Intracoastal Waterway.

b. *Market Segmentation by Commodity*

Opponents assert that there exists little overlap in barge competition across various commodity groups, particularly grains and coal, because of dissimilarities in both demand and

supply characteristics of these commodity submarkets. They argue that each commodity group should be analyzed as a completely separate barge market.

However, while some of the prominent grain and coal hauling barge firms concentrate on either grains or coal (*e.g.* Crounse and M/G for coal), other large and effective competitors, like ACBL, carry significant amounts of both commodities. For example, ACBL's traffic base is 56.4 percent coal and 26.4 percent grain, and Dravo Mechling's is 20.5 percent coal and 28.2 percent grain.[1] Thus many firms actively and substantially participate simultaneously in competition for both grain and coal traffic.

The two most significant capital expenditures of most barge firms are towboats and barges. Towboats can clearly be used to haul any commodity. In terms of barges, however, opponents assert that those barges primarily involved in hauling grain cannot easily be used to carry coal and that coal barges cannot easily be used to haul grain if (short-term) profitable opportunities arise. However, a barge is simply a big steel box, generally either 195 or 200-feet long and 35-feet wide. Barges may vary in size for particular trades and may have some special features for particular cargos. They may be sloped on the end and they may be square. A barge may have covers on top to protect cargo or may simply be open. While typically the same sized dry jumbo cargo barges are used for both grain and coal, barges used primarily for grain must have covers, and barges used for carrying coal sometimes are built with heavier steel reinforcements than grain barges.

Nonetheless, the record contains many examples of barges moving in response to market conditions from one liquid use to another or from one dry use to another, particularly from grain to coal. The latter movement only requires the barge covers to be removed and, usually, stacked on the barge. For example, it is not at all uncommon to see grain company barges, identifiable by their markings, loading coal at coal

[1] V.S. of Alfred Kahn, WTA-30, Table 1.

docks on the Ohio River, particularly in winter when grain is not available on the northern rivers. And when M/G left the grain transport business in the mid-1970's, it simply converted most of its covered barge fleet to coal barges by removing (and later putting out for sale) the covers.

Opponents allege that open and covered barges are not interchangeable because first, covered barges often lack the inner bottom steel thickness and reinforcement of an open barge, so that repeated coal loading and unloading substantially reduces their useful life; and, second, some terminals are designed to handle those (open) coal barges with lower coaming, so that grain barges with covers stacked on the ends cannot clear the leading spout.

However, we conclude barge design is a matter of owner preference rather than a requirement of cargos or operating characteristics of any given river system. For example, ACBL's philosophy is not to emphasize differences in barge design for various commodities, other than covers, so Jeffboat, ACL's barge manufacturing subsidiary, manufactures the *same* hopper barge whether it is destined to be operated open or closed.

Rather than demonstrating the specialization of barge equipment, these particular design differences represent operational choices for carriers that are resolved on the basis of their respective operating philosophies. Different carriers reach different conclusions concerning these matters. For example, Crounse's decision to put 47 more tons of steel into its (coal) barges in the belief that they will have a longer useful life is an operating decision that the extra cost of the barge and the reduction in cargo carrying capacity for that barge when loaded to the same draft as a light barge is justified by the longer useful life of the barge. No one can reasonably say that Crounse's weighing of these factors is the only "right" one. In addition to the additional capital cost, those 47 tons of steel replace 47 tons of cargo at the same loaded draft, about 3 percent of a barge's normal 1,500 ton capacity.

The record provides many specific instances of covered barges being used to transport coal in one direction in order to provide covered barges for a grain backhaul. For example, carriers active in the grain trade, both for-hire and private carriers, use their hopper barges with their covers stacked at the ends to compete in open top trades, like coal, scrap, ores and steel plate. A typical example of this is ACBL's coal movement to Illinois Power's Hennefin plant. Illinois basin coal is moved from Ohio River and Mississippi River origins in covered hoppers with the covers stacked. The barges move on to the Illinois River for unloading by Illinois Power. The empty barges are then cleaned, covered, and shifted to Illinois River grain terminals for movements to the Gulf area, where the barges are cleaned and, in some instances, loaded with alumina for Ohio River destinations.

Thus covered barges can be converted into open barges and vice versa. Covers can be stacked at one end of a barge when they are not needed and the barge itself can be used as an open barge. Covers can be easily removed permanently, as is frequently done with older barges when the covers have deteriorated more than the hopper. Conversely, open barges can usually be converted to covered barges with steel or fiberglass covers. Essentially, then, a hopper barge is interchangeable with another hopper barge for most cargo.

What is evident is that bargelines operate a large number of barges capable of transporting different commodities between diverse points on the waterway system. The available data show that (as of 1982) 16,299 dry cargo barges were owned by the 33 carriers possessing 100 or more units. All can be use to carry coal, metallic and non-metallic ores, and similar commodities not requiring weather protection; two-thirds (more than 10,000 barges) are equipped with covers and can be employed to haul grain and other dry cargo needing protection from the elements. This indicates the existence of a vast array of portable assests that can be readily adapted to diverse usage.

We conclude that barge specialization is not an impediment to ease of switching by barge firms from one commodity to another. Effective competition and related market discipline over price and service levels brought about by this type of switching does not require every barge to be substitutable for every other barge. All that is needed is that every barge operation face the prospect of some potential entry in case it is conducted inefficiently or earns excessive profits.

[ICC DECISION] APPENDIX D

FINANCIAL CONDITION OF APPLICANTS

CSX Corporation

CSX Corporation began operations on November 1, 1980, as the successor of the two railroad holding companies, which were merged. Chessie System, Inc. and Seaboard Coast Line Industries, Inc. Transportation operating revenues, principally from the railroad operations, accounted for about 93 percent of CSX Corporation's total revenues in each of the years, 1980 through 1982.

During 1983, CSX Corporation acquired control of Texas Gas Resources Corporation (TGR), a natural resources corporation (primarily natural gas) also having transportation subsidiaries. Funds for this $1 billion transaction were derived from CSX Corporation's corporate cash, the sale of additional shares of common stock, and the issuance of commercial paper. As a result of this diversification, transportation operating revenues declined to about 80 percent of the company's total operating revenues in 1983, according to CSX Corporation's 1983 Shareholder's Annual Report.

Tables 1 and 2 show a condensed income statement and balance sheet for CSX Corporation for the years 1980-1982. Although operations were affected by a recession in 1982, cash and working capital measures of a firm's liquidity) increased between December 31, 1980, and December 31, 1982, while

long-term debt declined. Moody's Investors Service and Standard & Poor's Corporation, two nationally recognized bond rating services, upgraded their debt ratings of the Chesapeake and Ohio, Baltimore and Ohio, Western Maryland, and Louisville and Nashville railroad's subsidiaries in 1982.[1] Most equipment trust certificate debt was reclassified as high grade investment (*i.e.*, Aa) and most mortgage debt was reclassified as upper medium grade investments (*i.e.*, A) under these rating systems.

As of December 31, 1982, CSX Corporation's cash balance was $528.1 million (32.5 percent of current assets); the debt-equity ratio at December 31, 1982, was 33.5 percent (compared to a 35 percent composite average for all class I railroads); the 1982 throw-off-to-debt-ratio (ability to generate cash from operations and depreciation to pay the principal on long-term debt that matures during the year) was approximately 3.5 times; and the return on shareholders' equity during 1982 was 9.6 percent, compared to the all-industry return on equity for the 12 months ending December 31, 1982 of 9.2 percent.[2] Following CSX Corporation's acquisition of TGR, the company reported cash of $265.4 million at December 31, 1983 (13.6 percent of current assets); the throw-off-to-debt-ratio declined to approximately 2.7 times; the return on shareholders' equity during 1983 declined to 6 percent (all-industry return on equity for the 12-months ending September 30, 1983 was 9.4 percent); the debt-equity ratio improved to 32.6 percent, and $340 million in commercial paper debt, issued in conjunction with the merger, was given Moody's, Standard & Poor's, and Fitch rating services' highest rating for commercial paper debt (*i.e.*, P-1, A-1, F-1). As a result of CSX Corporation's merger with TGR, the company's assets have grown from $7.5 billion at December 31, 1980 to $10.8 billion at December 31, 1983.

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[1] Prior to the consolidation, the holding company itself had little or no debt. Most of the debt was carried on the books of CSX Corporation's railroad subsidiaries.

[2] The rate of return for all-manufacturing, retailing, wholesaling and mining firms, as published by the Bureau of the Census in its "Quarterly Financial Report."

Table 1

CSX CORPORATION AND CONSOLIDATED SUBSIDIARIES

SELECTED INCOME STATEMENT DATA
1980 - 1982
(MILLIONS OF DOLLARS)

	Years Ended December 31		
	1982	1981	1980
Operating Revenues	$4,908.6	$5,432.2	$4,841.4
Operating Expenses	4,571.4	4,823.7	4,333.5
Net Revenue from Operations	$ 337.2	$ 608.5	$ 507.9
Other Income—Net	245.9	70.0	37.9
Interest Expense	(174.8)	(185.9)	(180.7)
Income from Continuing Operations before Income Taxes	408.2	492.6	365.1
Net Income	$ 338.4	$ 367.7	$ 281.6
Dividends Paid[1]	$ 118.7	$ 111.2	$ 86.9

SOURCE: CSX Corporation Shareholders' Annual Report

[1] From Statement of Changes in Financial Position.

Table 2

CSX CORPORATION AND CONSOLIDATED SUBSIDIARIES

SELECTED BALANCE SHEET DATA — 1980-1982
(MILLIONS OF DOLLARS)

	As of December 31		
	1982	1981	1980
ASSETS			
Current Assets			
Cash and Short-term Investments	$ 528.1	$ 457.0	$ 346.5
Materials and Supplies	243.0	266.3	250.1
Total Current Assets	$1,625.5	$1,716.8	$1,548.7
Investments and Other Assets			
Properties — Net	$6,064.9	$5,952.5	$5,611.9
Affiliates and Other Companies	90.3	117.8	126.9
Other Assests	328.4	279.8	235.6
Total Investments and Other Assets	$6,483.6	$6,350.1	$5,974.4
TOTAL ASSETS	**$8,109.1**	**$8,066.9**	**$7,523.1**
LIABILITIES			
Current Liabilities			
Long-term Debt Due Within One Year	$ 167.3	$ 172.5	$ 180.3
Total Current Liabilities	$1,363.1	$1,417.5	$1,313.8
Long-Term Debt Due After One Year	$1,865.7	$2,005.0	$2,068.0
Deferred Income Taxes	$ 793.6	$ 743.6	$ 549.8
All Other Liabilities	$ 688.5	$ 799.2	$ 718.4
TOTAL LIABILITIES	$4,710.9	$4,915.3	$4,650.0
SHAREHOLDERS' EQUITY			
Capital Stock	$ 42.3	$ 41.6	$ 40.9
Other Capital	1,236.6	1,208.3	1,184.0
Retained Earnings	2,123.2	1,904.7	1,648.2
TOTAL SHAREHOLDERS' EQUITY	$3,398.2	$3,151.6	$2,873.1
TOTAL LIABILITIES AND SHAREHOLDERS' EQUITY	**$8,109.1**	**$8,066.9**	**$7,523.1**

SOURCE: CSX CORPORATION SHAREHOLDERS' ANNUAL REPORT

Table 3

AMERICAN COMMERCIAL LINES, INC. AND CARRIER SUBSIDIARIES

SELECTED INCOME STATEMENT DATA
1980 - 1982
(MILLIONS OF DOLLARS)

	Years Ended December 31		
	1982	1981	1980
Operating Revenues	$193.1	$234.8	$205.2
Operating Expenses	159.1	181.3	157.9
Net Revenue from Operations	$ 34.0	$ 53.5	$ 47.3
Other Income—Net	16.1	42.1	4.6
Miscellaneous Deductions—Net	(8.6)	(7.5)	(7.4)
Fixed Charges	(10.2)	(10.5)	(16.1)
Income from Continuing Operations before Income Taxes	31.3	77.6	28.4
Net Income	$ 23.3	$ 57.9	$ 13.3
Dividends Paid[2]	$ 38.3	—	—

SOURCE: F.D.No. 30300, Supplemental Information Request Volume I, CSX-37.

[2] From Statement of Changes in Financial Position.

Table 4

AMERICAN COMMERCIAL LINES, INC. AND CARRIER SUBSIDIARIES

SELECTED BALANCE SHEET DATA — 1980-1982
(MILLIONS OF DOLLARS)

	As of December 31		
	1982	1981	1980
ASSETS			
Current Assets			
Cash and Short-term Investments	$ 1.4	$ 1.5	$ 3.6
Materials and Supplies	2.9	3.4	3.4
Total Current Assets	$ 90.5	$ 74.0	$ 65.0
Investments and Other Assets			
Properties — Net	$237.5	$240.6	$215.7
Investments in Affiliates and Other Companies	18.1	27.1	27.1
Undistributed Earnings in Affiliated Companies	71.7	83.8	58.2
Other Assets	36.1	31.5	36.5
Total Investments and Other Assets	$363.4	$383.0	$337.5
TOTAL ASSETS	**$453.9**	**$457.0**	**$402.5**
LIABILITIES			
Current Liabilities			
Long-term Debt Due Within One Year	$ 4.1	$ 4.7	$ 6.4
Total Current Liabilities	$ 54.9	$ 40.0	$ 40.5
Long-Term Debt Due After One Year	$ 78.9	$ 87.9	$107.6
Reserves	$ 10.7	$ 9.1	$ 5.6
Deferred Credits	$ 71.6	$ 67.2	$ 53.9
TOTAL LIABILITIES	$216.1	$204.2	$207.6
SHAREHOLDERS' EQUITY			
Capital Stock	$ 6.0	$ 6.0	$ 6.0
Capital Surplus	40.4	40.4	40.4
Retained Income	191.4	206.4	148.5
TOTAL SHAREHOLDERS' EQUITY	$237.8	$252.8	$194.9
TOTAL LIABILITIES AND SHAREHOLDERS' EQUITY	$453.9	$457.0	$402.5

SOURCE: F.D. No. 30300, Supplemental Information Request Volume I, CSX-37.

[ICC DECISION] APPENDIX E

REPORTING AND OVERSIGHT CONDITIONS

1. *Corporate structure.* The corporate structure of ACL and its subsidiaries shall not be altered without the prior approval of the Commission. Neither ACL nor any of its subsidiaries shall sell or otherwise transfer ownership of any assets with a fair market value in excess of $200,000, or of any water carrier equipment regardless of value, to CSX or to any subsidiary of CSX (except other ACL subsidiaries or ACL), directly or indirectly, without prior approval of the Commission.

2. *Reporting.*

(a) *General.* During the first year following consummation of the transaction, applicants shall submit a semiannual report to the Commission on or before the thirtieth day after the close of the preceding six months. After the first year and annually for a period of 5 years (or longer, if so ordered by subsequent amendment), applicants shall submit reports to the Commission on or before March 31st of each year for each preceding calendar year. Except for confidential information clearly identified by applicants, all reports shall be open for inspection and copying by the public.

(b) *Specific reports.*

(i) *Financial.* For the time period covered by the report, ACBL's reports shall contain the information required in Decision No. 3, served October 19, 1983, Appendix A, III, paragraphs 1 and 2, Appendixes B[1] and C, and also all ACBL intercorporate transactions.

(ii) *Rates.* CSX shall file reports that reflect the period for which it is being filed and shall inform the Commission about all changes in the proportional or local rates that its

[1] The report should not include commodities with the following codes: 0112, 01121, 01131, 01133, 01135, 08, 09, 13, 19, 21, 23, 25, 27, 30, 31, 34, 37, 38, 39, 41, 42, 44, 45, 46, and 47, because of the minimal amount of this traffic handled by ACBL in 1982 (CSX-37, Appendix C, Attachment 2).

railroad subsidiaries had in effect during each quarter to all water points (transshipment points) served by ACBL. These reports shall also include information regarding all new contracts entered into during the quarter and all existing contracts amended or canceled during the quarter relating to rail service to transshipment points served by ACBL.

(c) The annual report shall include any additional information required by the Commission in its notice of the annual oversight proceeding.

3. *Oversight proceeding.* The Commission will hold oversight proceedings annually for a period of 5 years (or longer, if so ordered by subsequent amendment to these conditions) after consummation of the transaction. At least one year after consummation, but not more than two years, the first oversight proceeding will begin on April 30th, and on the same date each year thereafter.

Notice of each annual oversight proceeding will be approved by the Commission and published in the *Federal Register* at least 30 days before the due date for filing of the annual report required in Condition 2. The notice will require CSX to provide a copy of the report to anyone making a request prior to the filing due date. The notice will advise the public that comments on the annual report and on the transaction, concerning compliance with the statutory standards of 49 U.S.C. 11321 and any benefits resulting from the transaction, may be filed with the Commission and served on CSX no later than April 30 following the filing of each annual report.

After receipt of public comments, the proceeding will be assigned to an Administrative Law Judge (ALJ). Upon his own motion or upon request of the parties, the ALJ may order that oral hearings be held and may receive additional written and oral evidence and argument. Proceedings before the ALJ receiving additional evidence and argument, both written and oral, shall be completed by June 30.

The ALJ shall prepare a report to the Commission on the oversight proceeding. The report willl be completed and served on applicants and on commenting parties no later than July 31. The report shall summarize the evidence presented and recommend to the Commission whether the evidence warrants reopening the consolidation proceeding for further consideration. The ALJ's report shall not recommend any action other than whether to reopen the proceeding. The Commission will not entertain exceptions to, or petitions for reconsideration of, the ALJ's report. The Commission will issue a decision by August 31 on whether to reopen the proceeding or take any other action based on the ALJ's report.

APPENDIX F

PANAMA CANAL ACT, Ch. 390, § 11, 37 Stat. 566-68 (1912):

SEC. 11. That section five of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, is hereby amended by adding thereto a new paragraph at the end thereof, as follows:

> "From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense."

Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The commission may on its own motion or the application of any shipper institute proceedings to inquire

into the operation of any vessel in use by any railroad or other carrier which has not applied to the commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said commission shall be final.

If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: *Provided*, Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered and granted thereafter.

No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said canal if such ship is owned, chartered, operated, or controlled by any person or company which is doing business in violation of the provisions of the Act of Congress approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," or the provisions of sections seventy-three to seventy-seven, both inclusive, of an Act

approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue of the Government, and for other purposes," or the provisions of any other Act of Congress amending and supplementing the said Act of July second, eighteen hundred and ninety, commonly known as the Sherman Antitrust Act, and amendments thereto, or said sections of the Act of August twenty-seventh, eighteen hundred and ninety-four. The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ship are parties. Suit may be brought by any shipper or by the Attorney General of the United States.

That section six of said Act to regulate commerce, as heretofore amended, is hereby amended by adding a new paragraph at the end thereof, as follows:

"When property may be or is transported from point to point in the United States by rail or water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

"(a) To establish physical connection between the lines of the rail carrier and the dock of the water carrier by directing the rail carrier to make a suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of its right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a spur track or tracks to the dock. This provision shall only apply where such connection is reasonably

practicable, can be made with safety to the public, and where the amount of business to be handled is sufficient to justify the outlay.

"The commission shall have full authority to determine the terms and conditions upon which these connecting tracks, when constructed, shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier. The provisions of this paragraph shall extend to cases where the dock is owned by other parties than the carrier involved.

"(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

"(c) To establish maximum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

"(d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country."

The orders of the Interstate Commerce Commission relating to this section shall only be made upon formal complaint or in proceedings instituted by the commission of its own motion

and after full hearing. The orders provided for in the two amendments to the Act to regulate commerce enacted in this section shall be served in the same manner and enforced by the same penalties and proceedings as are the orders of the commission made under the provisions of section fifteen of the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten, and they may be conditioned for the payment of any sum or the giving of security for the payment of any sum or the discharge of any obligation which may be required by the terms of said order.

49 U.S.C. § 5(15)-(17) (1976):

(15) Interest in competing water carrier; prohibition

Notwithstanding the provisions of paragraph (2) of this section, from and after the 1st day of July 1914, it shall be unlawful for any carrier, as defined in section 1(3) of this title, or (after September 18, 1940) any person controlling, controlled by, or under common control with, such a carrier to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which such carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

(16) Determination of fact of competition

Jurisdiction is conferred on the Commission to determine questions of fact, arising under paragraph (15) of this section, as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of such

paragraph and may pray for an order permitting the continuance of any vessel or vessels already in operation, or may pray for an order under the provisions of paragraph (17) of this section. The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final.

(17) Permission of interest in competing water carrier

Notwithstanding the provisions of paragraph (15) of this section, the Commission shall have authority, upon application of any carrier, as defined in section 1(3) of this title, and after hearing, by order to authorize such carrier to own or acquire ownership of, to lease or operate, to have or acquire control of, or to have or acquire an interest in, a common carrier by water or vessel, not operated through the Panama Canal, with which the applicant does or may compete for traffic, if the Commission shall find that the continuance or acquisition of such ownership, lease, operation, control, or interest will not prevent such common carrier by water or vessel from being operated in the interest of the public and with advantage to the convenience and commerce of the people, and that it will not exclude, prevent, or reduce competition on the route by water under consideration: *Provided*, That if the transaction or interest sought to be entered into, continued, or acquired is within the scope of paragraph (2)(a) of this section, the provision of paragraph (2) of this section shall be applicable thereto in addition to the provisions of this paragraph: *And provided further*, That no such authorization shall be necessary if the carrier having the ownership, lease, operation, control, or interest has, prior to September 18, 1940, obtained an order of extension under the provisions of paragraph (21) of this section, as in effect prior to such date, and such order is still in effect.

49 U.S.C. § 11321 (1982):

§ 11321. Limitation on ownership of certain water carriers

(a) (1) Notwithstanding sections 11343 and 11344 of this title, a carrier, or a person controlling, controlled by, or under common control with a rail, express, sleeping car, or pipeline carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may not own, operate, control, or have an interest in a water common carrier or vessel carrying property or passengers on a water route with which it does or may compete for traffic.

(2) The Commission may decide, after a full hearing, questions of fact related to competition or the possibility of competition under this subsection on application of a carrier. A carrier may file an application to determine whether an existing service violates this subsection and may request permission to continue operation of a vessel or that action be taken under subsection (b) of this section. The Commission may begin a proceeding under this subsection on its own initiative or on application of a shipper to investigate the operation of a vessel used by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter if the carrier has not applied to the Commission and had the question of competition or the possibility of competition determined under this subsection.

(b) Notwithstanding subsection (a) of this section, the Commission may authorize a carrier providing transportation subject to the jurisdiction of the Commission under that subchapter to own, operate, control, or have an interest in a water common carrier or vessel that is not operated through the Panama Canal and with which the carrier does or may compete for traffic when the Commission finds that ownership, operation, control, or interest will still allow that water common carrier or vessel to be operated in the public interest advantageously to interstate commerce and that it will still

allow competition, without reduction, on the water route in question. However, section 11343 of this title also applies to a transaction or interest under this subsection if the transaction or interest is within the scope of that section. The Commission may begin a proceeding under this subsection on application of a carrier. An authorization under this subsection is not necessary for a carrier that obtained an order of extension before September 18, 1940, under section 5(21) of the Interstate Commerce Act (37 Stat. 567), as amended, if the order is still in effect.

(c) The Commission may take action under this section only after a full hearing. An order entered as a result of the action may be conditioned on giving security for the payment of an amount of money or the discharge of an obligation that is required to be paid or discharged under that order.

APPENDIX G

The Ohio River Company: Midland Enterprises, Inc.; Eastern Gas & Fuel Associates; Midland Affiliated Company; Federal Barge Lines, Inc.; River Fleets, Inc.; Boston Tow Boat Company; Chotin Transportation, Inc.; Eastern Associated Terminals Company; Marine Equipment Company; Omega Properties, Inc.; Orgulf Transport Co.; Red Circle Transport Co.; Midland Properties, Inc.; Capital Marine Supply, Inc.; Hartley Marine Corp.; Inland Water Propulsion Systems, Inc.; The Ohio River Terminals Company; Port Allen Marine Services, Inc.; Port Allen River Plant, Inc.; United Barge Co.; Heartland Transportation, Inc.; Triangle Fleeting Corporation; Algonquin Energy, Inc.; Beacon Exploration Corp.; Beacon Holding Company; Beacon Exploration Company; Energetics Capital Joint Venture; Beacon Exploration Company of Texas; Mohawk Oil and Gas Corp.; Boston Gas Company; Massachusetts LNG Incorporated; Boston Gas Products, Inc.; Coal Properties Corp.; Associated Coal Sales Corp.; Charles Coal Company; Colony Bay Coal Company; Eastern Associated Coal Corp.; Affinity Mining Company; Castner, Curran & Bullitt, Inc.; EACC Camps, Inc.; Second Sterling Corp.; Sterling Smokeless Coal Company; Sterling Smokeless Fuel Corp.; Eastern Associated Coal Sales Corp.; Eastern Royalty Corp.; NuEast Mining Corp.; Eastern Associated Capital Corp.; The Eastern Associated Foundation; Eastern Associated Real Estate Corp.; Eastern Energy Systems Corp.; Eastern Exploration Corporation; Eastern Realty Corp.; Eastern Urban Services, Inc.; E G Leasing Corp.; Mystic Steamship Corporation; PCC Land Company, Inc.; Philadelphia Coke Co., Inc.; Western Associated Coal Corp.; Beacon Coal Corp.; Chatham Coal Company; Canyon Coal Corp.; Powderhorn Coal Company; Delta Properties Corp.; Grand Mesa Properties Co.; Eastern Associated Properties Corp.; North Fork Energy Corp.; Blue Ribbon Coal Company; River Prop-

erties Corp.; Powderhorn Properties Company; Roaring Fork Coal Corp.; Snowmass Coal Company; Tremont Coal Corp.; Grand Mesa Coal Co.; Western Associated Energy Corp.; Western Associated Properties of Colorado Corp.

M/G Transport Services, Inc.: The Midland Company; Midland-Guardian Co.; Midland Insta-Change Co.; Mustang Mobile Homes of Alabama, Inc.; M/G Securities, Inc.; Midland Mineral Resources, Inc.; Kanauga Supply Co.; Midwest Enterprises, Inc.; Marbury Agency, Inc.; Atlas Insurance Agency, Inc.; American Modern Life Insurance Company; Main Life Insurance Company; American Modern Home Insurance Company; American Western Home Insurance Company; American Family Home Insurance Company; American Southern Home Insurance Company; Lloyds Modern Corporation; American Modern Lloyds Insurance Company.

Canal Barge Company, Inc.: Central Marine Service, Inc.; New Orleans, Vicksburg Packet; The Webster Company; Gulfside, Inc.; Dixie Parking Service, Inc.; Suffolk Marine Corporation; Central Barge Company, Inc.; CMS International, Inc.; Pelican Marine Carriers, Inc.

Dixie Carriers, Inc.: Kirby Exploration Company, Inc.; Canadian Kirby Petroleum, Ltd.; Caribbean Data System, Inc.; Chemical Towing Company; Kirby Investment Corporation; Kirby Petroleum del Ecuador, S.A.; Kirby Petroleum (Scotland) Limited; Kirby Securities Corporation; Universal Insurance Company; Ellis Towing & Transportation Co.; The Mariner Reinsurance Company Limited; Bolivar Terminal Company, Inc.; Precision EPI Corporation; Silicon Services, Inc.; Richport Reinsurance Company, Ltd.; General Energy Corporation; Graphite Susceptor, Inc.; Kirby Exploration Company of Texas; DLM Coal Corporation; Horner Coal Corporation; B.T.U. Sales, Inc.; Richport Insurance Company.

The Valley Line Company: Airport Service, Incorporated; Orange Coast Sightseeing Company; Albe, S.A.; Albe Far East Limited; American Transit Corp.; Chromalloy American Corporation; Chromalloy Finance Corporation; Chromalloy Leasing, Inc.; Madison Service Corporation; National Seating Company; The Centor Company; Centor Center, Inc.; Transit Service Corporation; Central Barge Line, Inc.; Chromalloy Europa N.V.; Machinefabriek A. van der Linden, B.V.; Cro-Marine, Inc.; Flowers Transporation, Inc.; J. Russell Flowers, Inc.; Flowers Transport, Inc.; Cro-Marine Transport, Inc.; Cro-Dispatching, Inc.; E.R.K. Manufacturing, Inc.; Elyria Foundry Company; Gas Turbine Corporation; Gemoco (UK) Limited; J. Caslake Limited; Industrial Applications International, Inc.; Laidig, Inc.; Missouri River Barge Lines, Inc.; The Saval Group, Inc.; American Universal Insurance Company; Canadian Universal Insurance Company Limited; Imperia Adjusting Office, Inc.; Canadian Universal Insurance Company, Incorporated; Assurers Service, Inc.; E. Givernaud, Incorporated; Maurice H. Saval Incorporated; Sabine Towing & Transportation Co., Inc.; Security Barge Lines, Inc; Societe Nouvelle de Metallurgie Univecier, S.A.; Sturm Machine Co., Inc.; Swiss Albe, Inc.; Turbine Service, Ltd.; Turbine Support Europe, B.V.; Turbochrome Ltd.; Vananzetti Vibrazioni, S.P.A.

S. C. Loveland Co., Inc.: Towing, Inc.; Tug Leasing Corp.; Quaker Tugs, Inc.

SCNO Barge Lines: SCNO, Inc.; Exchange Building Corp.; Henry Crown and Company; Henry Crown (Illinois) Corp.; C. C. Industries, Inc.; University Exchange Corp.; Stickney Terminal Corp.; Mills-American Envelope Co.; Kruysman, Inc.; Whitting-Patterson Co.; American Envelope Corporation; Crown Point Envelope Co.; Aberdeen Manuf. Corp.; Finkel Outdoor Products, Inc.; Cameo Curtains, Inc.; Burton-

Dixie of Blacksburg, Inc.; Monroe Manuf. Corp.; CHF Industries, Inc.; Gear, Inc; Collonade Corporation; Collonade Park Realty Co.; Monticello Realty Corporation; Broad Edge Corporation; Lindrich Corp.; Lindrich Realty, Inc.; Lindrich Service Corporation; Kratex Products, Inc.; Lee L. Woodard, Inc.; Kratex of Troy, Inc.; Jefferson Lock Co.; The Park-Gray Corporation; W.H. Barber Co.

Tampa Electric Company: TECO Energy, Inc.; TECO Coal Corporation; Electro-Coal Transfer Corporation; Gulfcoast Transit Company; Mid-South Towing Company; TECO Towing Company; Southern Marine Management Company; Gatliff Coal Company; TECO Transport & Trade Corporation.

Gatliff Coal Company: Tampa Electric Company and the other corporations listed for it.

TECO Transport & Trade Corporation: Tampa Electric Company and the other corporations listed for it.

(3) (2)

Supreme Court, U.S.
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Nos. 85-2133 and 86-134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CROUNSE CORPORATION, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENTS CSX CORPORATION AND AMERICAN COMMERCIAL LINES, INC. IN OPPOSITION

MARK G. ARON
ALAN A. RUDNICK
CSX Corporation
One James Center
Richmond, Virginia 23219

MICHAEL L. HARRIS
MICHAEL A. KHOURI
American Commercial Lines, Inc.
1701 East Market Street
Jeffersonville, Indiana 47130

R. EDEN MARTIN
(Counsel of Record)
G. PAUL MOATES
CARTER G. PHILLIPS
VINCENT F. PRADA
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Respondents CSX Corporation and American Commercial Lines, Inc.

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the Panama Canal Act authorizes the Interstate Commerce Commission ("ICC") to approve a railroad's acquisition of a competing barge carrier when it concludes, after a full hearing and on the basis of extensive evidence, that the transaction will not reduce competition on affected water routes or enable the merged carrier to increase rates or exclude competitors.

2. Whether the Court of Appeals correctly held that the ICC's factual findings and legal conclusions relating to the competitive effects of a proposed rail-barge consolidation were consistent with the Panama Canal Act and supported by substantial evidence.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 85-2133 and 86-134

CROUNSE CORPORATION, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENTS CSX CORPORATION AND AMERICAN COMMERCIAL LINES, INC. IN OPPOSITION

CSX Corporation ("CSX") and American Commercial Lines, Inc. ("ACL") oppose the petition of Crounse Corporation, *et al.* (in No. 85-2133) and the cross-petition of Patrick W. Simmons (in No. 86-134) for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.[1]

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[1] In accordance with Rule 28.1 of the Rules of this Court, the subsidiaries and affiliates of CSX and ACL are set forth at page 1a of the Appendix hereto.

STATEMENT

A. The Panama Canal Act

The Panama Canal Act of 1912, Ch. 390, 37 Stat. 560, 566 (1912) (presently codified at 49 U.S.C. § 11321 and referred to hereinafter as the "Act") imposes certain restrictions on railroad ownership of water carriers. Section 11321(a) provides generally that a railroad may not own an interest in or control a "water common carrier" with which the railroad "does or may compete for traffic." Section 11321(b), however, expressly authorizes the ICC to approve such a rail interest in a competing water carrier when it finds, after a full hearing, that the common ownership (1) "will still allow competition, without reduction, on the water route in question," and (2) will still allow the water carrier "to be operated in the public interest advantageously to interstate commerce." [2] The Act delegates to the ICC exclusive authority to decide "questions of fact related to competition."

B. Initial Proceedings

This case involves CSX's acquisition of ACL as part of CSX's acquisition in 1983 of Texas Gas Resources Corporation ("Texas Gas"), ACL's parent company. CSX is a holding company that operates a railroad system, while ACL controls American Commercial Barge Line Company ("ACBL"), a certificated barge carrier. Because the transaction would bring under common control a railroad and a water carrier, it required an ICC determination under the Panama Canal Act.[3]

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[2] The ICC does not have authority under Section 11321(b) to approve a railroad's interest in a competing water carrier if it provides service through the Panama Canal. This absolute prohibition is not involved in the instant case.

[3] Because ACBL is an ICC-regulated water carrier, CSX's acquisition of ACL also required ICC approval under 49 U.S.C. § 11344(d). Under this provision the ICC is required to approve a transaction involving the merger, consolidation or control of at least two regu-

In order to prevent CSX from exercising control of ACL prior to ICC review of the consolidation, CSX and Texas Gas agreed to deposit the stock of ACL in an independent voting trust pursuant to ICC regulations. 49 C.F.R. § 1013. The ICC rejected a challenge brought by the Water Transport Association (a petitioner herein) to the voting trust arrangement.[4] In sustaining the ICC's voting trust decision, the D.C. Circuit examined at length the legislative history and purposes of the Act. The court rejected the claim that the Act embodies a strict prohibition of rail-barge combinations, and specifically held that "Congress clearly expected rail carriers to be able, with ICC approval, to acquire competing water carriers." 715 F.2d at 590.

On November 4, 1983, CSX and ACL filed a joint application seeking ICC approval of the transaction. The ten-volume application presented detailed evidence demonstrating that the proposed CSX/ACL consolidation would offer many significant operating and marketing benefits and would have no adverse effects on competition. The case was assigned to an administrative law judge, who held lengthy evidentiary hearings on the application. In all, the proceeding generated an extensive 15,000-page record, including over 200 verified statements of witnesses, 5,800 transcript pages and hundreds of written comments and letters by interested parties. In the course of these proceedings, the CSX/ACL application attracted

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lated carriers (other than two class I railroads) unless the ICC finds that (1) "as a result of the transaction, there is likely to be a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States," and (2) "the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs."

[4] *Water Transport Association—Petition for a Declaratory Order*, 367 I.C.C. 559, *aff'd sub nom. Water Transport Association* v. *ICC*, 715 F.2d 581 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984).

the support of over 260 private and public organizations (Pet. App. 63a-66a, 160a-162a). In addition, the proposed transaction was actively supported by the U.S. Department of Transportation.[5]

C. The ICC's Final Decision

The ICC unanimously approved the CSX/ACL consolidation in a decision served September 7, 1984 (Pet. App. 47a-210a). In a lengthy opinion, the ICC concluded that the transaction satisfied the requirements of the Act and of Section 11344(d) because it would result in no harm to, or reduction in, competition and would yield significant benefits to the shipping public.

1. *Section 11321(b): Competition.* The ICC first addressed the competition standard of the Panama Canal Act. The ICC found that, although CSX and ACL competed with one another sufficiently to bring the transaction within the provisions of Section 11321(a) (Pet. App. 91a-93a),[6] the consolidation of the two carriers would not violate the Act because, under Section 11321(b), the transaction would result in no reduction in competition "on the water route in question" (Pet. App. 93a-121a).

The ICC determined that the appropriate inquiry under the "competition, without reduction" standard in Sec-

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[5] The U.S. Department of Justice, which also participated in the ICC proceedings, took no position with respect to the merits of the specific CSX/ACL transaction but proposed in its written comments the framework ultimately adopted by the ICC for analyzing the competition issues under the Act (Pet. App. 70a).

[6] The ICC based its finding that CSX and ACL competed on the fact that the two carriers could physically serve a number of common points, and on evidence that the two carriers had competed head-to-head for several specific movements. The ICC found, however, that this competition between CSX and ACL was "modest," due to the significant cost advantage that bargelines (including ACL) enjoy over railroads for traffic originating or terminating within an area stretching from 25 to 200 miles inland from the navigable rivers (Pet. App. 102a).

tion 11321(b) was whether the CSX/ACL consolidation would impair competition by creating or enhancing opportunities for the merged entity to exercise market power, defined as the ability to raise rates above competitive levels or to exclude competitors (Pet. App. 86a-87a). The ICC concluded that this analytical approach, which was endorsed by the Department of Justice (Pet. App. 175a-177a), fully vindicated the policy of the Act, which was designed "to protect shippers from actions that result in non-competitive prices for transportation services, not to protect individual barge competitors" (Pet. App. 94a).[7]

Applying this analytical framework, the ICC decided to "focus" on barge transportation in assessing the potential competitive effects of the CSX/ACL consolidation (Pet. App. 89a). The ICC found that this focus was required by the Act, which instructs the ICC to examine the competitive effects of rail-barge combinations "on the water route in question," and was also supported by the evidence, which revealed that competition between railroads and barges was generally limited due to the higher cost structure of the railroads (Pet. App. 87a-88a).

Turning to an examination of the competitive structure of the inland waterways market served by ACL, the ICC concluded that "the record amply demonstrates that the barge industry today is highly competitive" (Pet. App. 94a). The ICC noted that "literally hundreds" of independent firms operate on the inland waterways served by ACL, and no single firm accounted for more than seven percent of the barge traffic (Pet. App. 94a, 97a). ACL accounted for a mere 6.54 percent of the tonnage carried by inland barge carriers in 1981 (Pet.

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[7] The ICC disavowed language in one of its earlier decisions which suggested that the preservation of competition in a particular market was synonymous with the preservation of the position of individual competitors within such markets (Pet. App. 80a-81a). *See Illinois Central Railroad Co.—Control—John I. Hay Co.*, 317 I.C.C. 39, 52 (1962).

App. 97a-98a). Based on these data and other measures of market concentration,[8] the ICC found that the barge industry was unconcentrated and "highly competitive" (Pet. App. 97a, 101a). In addition, the ICC found that the barge industry was characterized by ease of entry and exit, making potential competition an effective additional constraint on carrier action (Pet. App. 107a-115a). No carrier, including ACL, could exercise market power given the intensity of existing and potential competition.

The ICC concluded, moreover, that the CSX/ACL consolidation would not reduce this intense competition or enable the combined CSX/ACL to exercise market power by raising rates or excluding competitors. In its analysis, the ICC addressed the two ways in which opponents of the CSX/ACL consolidation claimed that the transaction could harm competition (Pet. App. 101a). First, opponents argued that, by eliminating ACL as an independent competitor of CSX, the merger could increase market concentration where the two carriers had previously competed. Second, opponents claimed that the consolidation might enable CSX/ACL to engage in predatory practices having the effect of eliminating other independent barge competitors, thereby permitting CSX/ACL to charge higher-than-competitive rates. The ICC fully examined each of these potential adverse effects and found that neither would occur.

First, the ICC found that the elimination of ACL as an independent competitor of CSX (the reduction by one in the large number of competitors) would not reduce competition (Pet. App. 102a-103a). Although CSX and

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[8] The ICC employed the Herfindahl-Hirschman Index, a measure of market concentration used by the Department of Justice to evaluate the potential competitive effects of corporate mergers. The ICC found that the Index for the barge industry was 172, far below the Justice Department's threshold of 1000 for mergers that pose even the possibility of anticompetitive effects (Pet. App. 99a).

ACL competed with one another to a limited extent, the ICC determined that the small increase in concentration resulting from their consolidation would not affect the vitality of competition because the transaction would "still leave hundreds of firms as active competitors," well above the number needed to preserve effective competition and preclude the exercise of market power (Pet. App. 103a).

Second, the ICC found that a combined CSX/ACL would not be able successfully to undertake predatory practices to eliminate independent barge competitors (Pet. App. 103a-120a). The ICC concluded that CSX/ACL would have neither the ability nor the incentive to divert CSX-originated rail traffic from independent barge carriers to ACL unless CSX/ACL could offer shippers better service and lower rates (Pet. App. 104a-105a, 116a-119a). The ICC noted that the transaction could result in some efficiency-related traffic diversions, but such diversions would be small and in any event would not impair the ability of independent bargelines to operate effectively (Pet. App. 117a-119a).[9] The ICC also found that the competitive nature of the barge industry would prevent CSX and ACL from successfully undertaking a strategy of predatory pricing (Pet. App. 106a-115a). The ICC explained that even if a combined CSX/ACL were to reduce its rates below competitive levels in an attempt to drive competitors out of business, it could never successfully raise its rates to monopoly levels and recoup its losses because independent bargelines would always be ready and able to enter the market and prevent rates from rising above competitive levels.[10] The ICC also

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[9] Thus, petitioners' statement that the ICC found that CSX/ACL would divert traffic from independent barge carriers is seriously misleading (Pet. 6). As the ICC made clear, such diversions could occur only if CSX/ACL were able to offer shippers better service and cheaper rates than its competitors—a result that is entirely pro-competitive and in the public interest (Pet. App. 119a).

[10] In this connection the ICC found that the inland barge industry was characterized by relative ease of entry and exit, low economies

examined and rejected claims that a merged CSX/ACL could successfully pursue various types of rate manipulation designed to eliminate barge competitors (Pet. App. 115a-119a, 190a).

In sum, the ICC made reasoned findings that the CSX/ACL consolidation would not result in any reduction in competition "on the water route in question," would not enable the merged system to exercise market power by raising rates above competitive levels and would not impair the ability of independent bargelines to compete.

2. *Section 11321(b): Public Advantage.* The ICC also concluded that the proposed CSX/ACL consolidation satisfied the "public advantage" standard of Section 11321(b) (Pet. App. 120a-121a). The ICC observed that this test was "closely related" to the competition standard because the preservation of effective barge competition, and the rate and service advantages that such competition fosters, further the public interest and promote interstate commerce. In any event, the ICC also found that the transaction would affirmatively benefit the shipping public by enabling the merged carrier to provide expanded single-system service to shippers, achieve cost savings and efficiencies and initiate innovative marketing strategies, all of which would be pro-competitive (Pet. App. 121a, 143a-145a).[11]

3. *Oversight and Reporting Conditions.* Even though the ICC expressed confidence that its "economic analyses . . . are accurate" (Pet. App. 120a), and that the trans-

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of scale and high mobility and substitutability of equipment—conditions which would render attempted predatory pricing and other anticompetitive practices futile (Pet. App. 107a-115a).

[11] The ICC also approved the proposed CSX/ACL consolidation under Section 11344(d). Citing the intense competition facing CSX and ACL both before and after their combination, the ICC concluded that the transaction would not substantially lessen competition, create a monopoly or restrain trade in freight surface transportation in any region of the United States (Pet. App. 122a-127a).

action would have no anticompetitive consequences, it took the extra precaution of imposing certain carefully tailored conditions, including reporting requirements and annual oversight hearings for five years, to permit the ICC to monitor the effects of the consolidation and to allow interested parties to present any evidence of possible anticompetitive effects (Pet. App. 120a, 145a-147a, 208a-210a). The ICC expressly retained jurisdiction "to take corrective action if adverse effects should materialize" (Pet. App. 120a).[12]

D. The Court of Appeals Decision

A divided court of appeals affirmed the ICC's decision (Pet. App. 1a-41a).[13] The court found that the ICC's approval of the CSX/ACL consolidation was based on a correct construction of the applicable statutes and fully supported by the record evidence.

Consistent with the decision of the D.C. Circuit in *Water Transport Association*, 715 F.2d 581, the court below rejected petitioners' claim that the Panama Canal Act embodies a "strict" prohibition of railroad ownership of barge carriers subject only to the "narrowest" of exceptions (Pet. App. 5a). Rather, the court held that the Act was intended to authorize the ICC to approve rail-barge common ownership when it finds that such ownership would not reduce competition (Pet. App. 6a-11a).

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[12] The ICC also imposed standard labor protection conditions in favor of CSX rail employees who might be adversely affected by the consolidation (Pet. App. 149a-151a). *See* 49 U.S.C. § 11347. Consistent with longstanding precedent, however, the ICC declined to extend such protection to employees of rail carriers not involved in the transaction (Pet. App. 149a-150a).

[13] The CSX/ACL consolidation was consummated on October 11, 1984, when another panel of the court of appeals, following briefing and oral argument, declined to issue a stay of the ICC's decision pending judicial review. *Crounse Corp.* v. *ICC*, No. 84-3743, *et al.* (6th Cir. October 11, 1984). Since that time ACL has been operated by CSX as a separate constituent unit of the CSX transportation network as authorized by the ICC's order.

The court of appeals also rejected petitioners' specific claims concerning the ICC's interpretation and application of the Act in the circumstances of this case. The court held that it was permissible for the ICC to analyze the effects of the CSX/ACL consolidation on competition on "the water route in question" by focusing on barge competition, and it found no merit to petitioners' contention that the elimination of competition *between* CSX and ACL—"rail-barge competition"—itself required disapproval of the application (Pet. App. 11a-13a). The court also rejected petitioners' argument that the ICC improperly construed the Act to require a showing that a proposed rail-barge consolidation would actually eliminate barge competitors before it would be found to run afoul of the Act; the court held instead that the Act requires a showing that a particular consolidation would result in an actual reduction in competition through the elimination of independent barge carriers, and not "simply harm to particular bargelines due to intensified competition" (Pet. App. 14a).[14]

Finally, the court of appeals denied petitioners' various challenges to the ICC's determinations of fact relating to the competitive effects of the CSX/ACL consolidation (Pet. App. 15a-21a). Exercising appropriate deference to the expert agency's resolution of conflicting evidence, the court held that the ICC's findings were "based on a reasoned and justifiable view of the evidence of record" (Pet. App. 21a).[15]

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[14] The court of appeals similarly upheld the ICC's approval of the transaction under Section 11344(d), and addressed several procedural issues (Pet. App. 22a-31a). In particular, the court sustained the ICC's decision not to impose labor protection conditions for the benefit of non-CSX rail employees, and held that Section 11344(d) does not require the ICC to consider the interests of such employees in approving the transaction (Pet. App. 24a-26a).

[15] Judge Timbers dissented from the court of appeals' decision. Although agreeing with the majority that the Act does not estab-

E. The Annual Oversight Proceeding

Pursuant to the oversight and reporting conditions imposed as part of its decision approving the CSX/ACL consolidation, the ICC recently completed its first formal proceeding to examine the competitive effects of the transaction and CSX/ACL's compliance with the Act. The ICC had invited interested members of the public to submit comments on these issues. On the basis of these submissions, which included dozens of comments by shippers supporting the services offered by CSX/ACL (and not a single shipper comment in opposition), the ICC recently issued a report unanimously finding that the CSX/ACL consolidation has not diminished competition but in fact "has increased beneficial competition by allowing CSX and ACL to introduce new intermodal price and service options." [16] The ICC therefore concluded that there was no need to reopen the CSX/ACL consolidation proceeding.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any other decision by this Court or any other court, and raises no substantial question of federal law. Accordingly, review by this Court is not warranted.

1. At issue in this case is the proper interpretation and application of the Panama Canal Act of 1912, which

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lish an absolute prohibition of railroad ownership of bargelines, Judge Timbers believed that the ICC had misapplied the Act in the particular context of the CSX/ACL transaction (Pet. App. 33a). In particular, Judge Timbers disagreed with the ICC's decision to focus its competitive analysis of the transaction on barge competition and, based on his own reweighing of the evidence and assessment of the record before the ICC, disagreed with the ICC's finding that the CSX/ACL consolidation would not reduce competition or result in the elimination of independent barge carriers.

[16] Finance Docket No. 30300, *CSX Corporation—Control—American Commercial Lines, Inc.*, at 2 (served August 29, 1986). A copy of the oversight decision has been lodged with the clerk of this Court.

imposes certain restrictions on rail-barge common ownership. Since its enactment, the Act has seldom been interpreted by any court. Indeed, during the past 60 years only one other court of appeals has construed this relatively obscure statute, and its decision arose out of an interlocutory proceeding involving the same transaction at issue in the instant case. *Water Transport Association*, 715 F.2d 581 (sustaining CSX/ACL voting trust against challenge based on Act). The decision below is fully consistent with this earlier decision, as the court of appeals noted (Pet. App. 10a).[17]

2. Review is also unwarranted because the decision below raises no substantial federal question warranting plenary review by this Court. Running throughout all of petitioners' arguments before this Court is the claim that the Panama Canal Act embodies a "strict" prohibition of railroad ownership of barge carriers, subject only to the narrowest of exceptions (Pet. 7, 13, 17). The court of appeals' rejection of this construction of the Act is demonstrably correct (Pet. App. 6a-11a). Congress in Section 11321(b) *specifically authorized* the ICC to allow railroads to own interests in water carriers with which they compete, if the ICC found that such interests pose no risks of the anticompetitive harms at which the Act was aimed. Thus, the plain language of the Act refutes petitioners' suggestion that the Act embodies a "strict" prohibition of rail-barge interests.[18] In *Water Transport As-*

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[17] The only other judicial decision that has interpreted the substantive provisions of the Act in the past six decades upheld an ICC decision authorizing railroad ownership of a barge carrier. *American Waterways Operators, Inc.* v. *United States*, 386 F. Supp. 799 (D.D.C. 1974) (three-judge court), *aff'd sub nom. Water Transport Association* v. *United States*, 421 U.S. 1006 (1975) (per curiam).

[18] Moreover, the plain language of the Act also demonstrates that Congress knew how to impose a "strict" prohibition of rail-barge common ownership when it wanted to do so. As previously noted (note 2, *supra*), the Act establishes an absolute prohibition

sociation, 715 F.2d at 590, the D.C. Circuit, on the basis of a thorough review of the Act's history, held that "Congress clearly expected rail carriers to be able, with ICC approval, to acquire competing water carriers." [19]

The court of appeals' holding that the Act authorizes the ICC to approve rail-barge acquisitions that will not harm or reduce competition is also supported by the purposes and history of the statute. As the court of appeals explained, the Act was passed in 1912 in response to concerns that some railroads were using their control of water carriers to drive out independent water carriers and divert traffic to their parallel rail lines, thereby depriving the public of the rate and service advantages of water transportation (Pet. App. 7a). Congress was particularly concerned with predatory pricing— the practice by which some railroads sought to eliminate competition from the then-embryonic and struggling barge industry by acquiring a competing water carrier, reducing its rates below cost in order to drive out independent water carriers, and then raising the rates of the railroad-owned water carrier to supracompetitive levels in order to protect traffic on the railroad's higher rated rail lines.[20]

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of railroad ownership of competing water carriers if (and only if) they provide service through the Panama Canal. For water carriers (such as ACL) that do *not* provide service through the Canal, Congress intended no such absolute ban on railroad ownership but instead expressly authorized the ICC to approve such joint rail-barge interests.

[19] Contrary to petitioners' suggestion (Pet. 21), the Transportation Act of 1940, Pub. L. No. 785, 54 Stat. 898 (1940), reaffirmed the limited scope of the Act's prohibition of rail-barge interests by amending the Act to make clear that the ICC has authority under Section 11321(b) to approve railroad acquisitions of competing water carriers and not simply authority to continue rail-barge interests that preceded the Act. *See* Pet. App. 10a; *Water Transport Association*, 715 F.2d at 589-90.

[20] As the court below noted, the history of the Act is "replete" with references to this practice (Pet. App. 7a). *See, e.g.*, H.R. Rep. No. 423, 62d Cong., 2d Sess. 12 (1912); 48 Cong. Rec. 6,591,

Petitioners suggest that the court of appeals erred in focusing on predatory pricing because some legislators in 1912 cited other types of predatory practices by railroads (Pet. 14). The relevant materials clearly show, however, that predatory pricing was Congress' dominant concern. In any event, petitioners' assertion misses the mark because the court of appeals' point was simply that the Act was aimed at specific anticompetitive practices and was not intended as a strict prohibition of all rail-barge interests.

The court of appeals' interpretation of the Act is further supported by the ICC's decisions applying the 1912 statute. Those decisions, as the court below observed (Pet. App. 9a-10a), have consistently given effect to Section 11321(b) and contradict the notion that the Act mandates strict separation of railroads and bargelines.[21]

Thus, the court of appeals in this case correctly held that the Panama Canal Act does not embody a strict prohibition of rail-barge common ownership, but instead authorizes the ICC to approve such common ownership

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6,715, 9,238, 10,283, 10,373, 10,461, 10,562, 10,575. *See also Water Transport Association*, 715 F.2d at 587, 596; *American Waterways Operators*, 386 F. Supp. at 803; *Lake Line Applications*, 33 I.C.C. 699, 716 (1915), *appeal dismissed sub nom. Lehigh Valley Railroad Co.* v. *United States*, 234 Fed. 682 (E.D. Pa. 1916), *aff'd*, 243 U.S. 412 (1917).

[21] Indeed, the ICC has exercised its authority under Section 11321(b) to approve rail interests in competing water carriers in at least 34 separate cases since 1912. These decisions are listed at pages 2a-4a of the appendix hereto. Many of these decisions involved railroad interests in substantial water carrier operations. *See, e.g., Application of Missouri Pacific Railroad Co.*, 245 I.C.C. 143 (1941) (water service between New Jersey and Texas); *Investigation of Seatrain Lines, Inc.*, 206 I.C.C. 328 (1935) (water service between New Jersey and New Orleans); *Application of Southern Pacific Co.*, 32 I.C.C. 690 (1915) (water service between San Francisco and Panama). Although most of the cases involved railroad applications to continue their ownership of water carriers which pre-dated the Act, the standard applied by the ICC was the same as that applied to the CSX/ACL transaction (Pet. App. 79a).

when, on the facts before it, it concludes that no reduction in competition on affected water routes will result.[22] This holding, which is supported by the language, history and judicial interpretation of the Act, plainly does not warrant reexamination by this Court.

3. In addition to their broad but erroneous contention that the Panama Canal Act imposes a strict prohibition of railroad ownership of bargelines, petitioners allege that the ICC made inadequate findings in the specific factual context of the CSX/ACL consolidation and that the court of appeals erroneously sanctioned those findings. Petitioners' claims—which are wholly dependent upon the particular factual record in this case—raise no important or recurring question of federal law and, in any event, are without merit.

a. Contrary to petitioners' sweeping assertions that the ICC and court of appeals decisions approving the CSX/ACL consolidation will radically transform the structure of surface transportation competition (Pet. 9-11), the actual effects of the transaction and the decisions approving it have been and will be quite modest. The transaction involves a single railroad and a barge carrier which accounts for less than seven percent of the traffic carried on the affected water routes (Pet. App. 97a-98a).[23] The ICC found, and petitioners do not dispute, that the CSX/ACL consolidation will still leave "literally hundreds" of independent barge carriers providing competitive water transportation services on the inland waterways served by ACL (Pet. App. 94a). In

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[22] This interpretation does not, as petitioners suggest (Pet. 23), render the Act meaningless. The Act itself requires the ICC to consider rail-barge interests on a case-by-case basis, a flexibility which the court of appeals correctly noted was deliberate (Pet. App. 10a-11a).

[23] ACL's operating revenues in 1982 (the most recent year for which the ICC had financial data) were only $193.1 million (Pet. App. 206a), a relatively modest amount by United States industrial standards.

addition, the ICC found that potential competition from new entrants would further constrain the actions of CSX/ACL. Moreover, the ICC determined, after a thorough review of the evidence, that the CSX/ACL consolidation would not harm or reduce competition in any way and would not result in the elimination of competing barge carriers (Pet. App. 94a-120a). These factual findings are fully supported by the record, and the court of appeals therefore properly sustained them.[24]

b. Petitioners contend that the court of appeals erred by upholding the ICC's decision to "focus" (Pet. App. 89a) its competitive analysis of the CSX/ACL consolidation on the barge industry and on barge competition (Pet. 12-23). As the court of appeals explained in rejecting this claim, however, the plain language of the Act directs the ICC to consider whether the transaction will reduce competition "*on the water route in question*" (emphasis supplied), and "[b]arges, not trains, operate on water routes" (Pet. App. 11a-13a). The ICC's focus on barge competition in its evaluation of the competitive effects of the CSX/ACL consolidation also furthers the purposes of the Act. As explained above, Congress in 1912 was concerned with possible railroad domination of barge carriers and with the exploitation of railroad-owned vessels to drive independent water carriers out of business. *See* pages 13-14, *supra*; Pet. App. 13a; Pet. 15. Because the Act was thus clearly aimed at preserving *barge* competition, it was reasonable for the ICC to focus its competitive analysis of the CSX/ACL consolidation on the *barge* industry.

Moreover, the evidence and arguments presented to the ICC in this case also support the Commission's deci-

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[24] Stripped to its essentials, the opinion of the dissenting judge in this case represents a simple disagreement with the ICC's findings. The Act entrusts the determination of "facts relating to competition" to the ICC, however, not to reviewing courts.

sion to concentrate its competitive analysis under Section 11321(b) on barge competition.[25] No party, least of all petitioners, argued before the ICC that the CSX/ACL consolidation would have an adverse impact on railroads or impair the ability of independent rail carriers to compete. Instead, opponents of the transaction (including petitioners) alleged that the consolidation would reduce competition "on the water route in question" as a result of either (1) the elimination of ACL as an independent competitor of CSX or (2) the alleged ability of the combined CSX/ACL system to eliminate its independent barge competitors (*see* Pet. App. 187a-191a). The ICC carefully examined *both* of these claims and found that *neither* one had merit, given the intensity of existing and potential competition on the inland waterways (Pet. App. 101a-120a). The court of appeals therefore properly sustained the ICC's decision to "focus" on the barge industry, and petitioners' continued assertions that the ICC's findings are inadequate are entirely without merit.

c. With respect to the first theory raised by opponents of the CSX/ACL consolidation—that the transaction would reduce competition on "the water route in question" by eliminating competition *between* CSX and ACL (which petitioners characterize as "rail-barge competition")—petitioners claim that the ICC "ignored" the impact of the elimination of ACL as an independent competitor of CSX and that, had this impact been considered, the Act would have required disapproval of the CSX/ACL consolidation (Pet. 20). Petitioners' claim misstates the ICC and court of appeals decisions and rests on a misguided reading of the Act.

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[25] For example, the ICC determined that the relevant product market for purposes of competitive analysis was barge competition (Pet. App. 87a-90a). The court of appeals, noting that market definition is a factual question to which courts owe the agency "the greatest deference," sustained this finding (Pet. App. 16a-17a).

The ICC *did* consider the loss of competition *between* CSX and ACL as part of its examination of the impact of the CSX/ACL consolidation on barge competition. The ICC explained that because CSX and ACL competed with one another for some traffic, the transaction would necessarily eliminate this competition and reduce by one the number of competitors in the areas where CSX and ACL competed. The ICC concluded, however, that "the mere consolidation of ACL and CSX will not reduce the number of competitors sufficiently to create a reduction in competition on the water route in question" because hundreds of independent competitors would remain and prevent any exercise of market power by the merged CSX/ACL system (Pet. App. 102a-103a).[26]

Petitioners' claim that the ICC ignored rail-barge competition appears to rest on the proposition that the elimination of the direct competition between the two consolidating carriers itself required, as a matter of law, the disapproval of the merger under Section 11321(b) (Pet. 20). The ICC, however, correctly rejected this view of the statute, which it logically concluded would render Section 11321(b) "a nullity" (Pet. App. 188a).[27] If the elimination of competition *between* two consolidating carriers were sufficient to require a finding of a reduction of competition under Section 11321(b), then *no* rail-

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[26] Petitioners thus fundamentally misstate the ICC's decision when they assert that the ICC "does not at any point analyze the impact of the acquisition on competition between CSX and ACL" (Pet. 20).

[27] Petitioners' argument is based entirely on language from the ICC's 1962 decision in *John I. Hay Co.*, 317 I.C.C. 39 (Pet. 19-21). In rejecting petitioners' interpretation of the Act, however, the ICC expressly overruled its earlier decision to the extent that it suggested that a reduction in competition between the merging railroad and water carrier itself required disapproval of the transaction (Pet. App. 80a-81a). Apart from the language in the *John I. Hay Co.* decision cited by petitioners, no other ICC decision supports petitioners' radical interpretation of the Act.

barge consolidation could ever be approved under that section because all such transactions by definition involve two carriers that the ICC has found under Section 11321(a) to be direct competitors for traffic. Because *all* rail-barge mergers necessarily eliminate the direct competition formerly existing between those two carriers, petitioners' view of the Act would effectively nullify Section 11321(b), a result clearly contrary to Congress' express intent to authorize some rail-barge mergers.

The court of appeals, like the ICC, ruled that neither the degree of competition between CSX and ACL, nor the mere fact that the proposed transaction would eliminate this competition, was dispositive with respect to the approval of the consolidation under the provisions of Section 11321(b). The court observed that "[a] reduction in competition, even a significant one, between a railroad and a bargeline does not automatically portend a reduction in competition among the various bargelines" (Pet. App. 13a). Thus, consistent with the focus of the Act on preserving barge competition and not individual competitors (Pet. App. 80a-81a, 94a), the court of appeals reasonably held that what matters is not the reduction by one in the number of competitors but the *effect* of that reduction on barge competition. In this case, moreover, the ICC found that the elimination of ACL as an independent competitor of CSX would not reduce competition on the water route in question.

Petitioners nonetheless place heavy reliance on a footnote in the court of appeals' decision, which they read as a concession by the court that an examination of rail-barge competition between CSX and ACL would have required disapproval of the CSX/ACL consolidation (Pet. 20; Pet. App. 5a n.2). That reliance is misplaced. The court of appeals simply noted that the ICC could not plausibly have based its Section 11321(b) determination of no reduction in competition *solely* on a finding of "minimal" competition between CSX and ACL. As the

court recognized, however, the ICC did no such thing, but instead went on to examine in greater detail the *effect* of the transaction (and the elimination of competition between CSX and ACL) on barge competition.

Thus, there is no merit to petitioners' claim that the elimination of competition between CSX and ACL required disapproval of the consolidation under the Act. To the extent that petitioners' argument rests on the proposition that the loss of competition between any two merging carriers requires an adverse finding regardless of the effect on barge competition generally, petitioners' claim is based on a tortured reading of the Act properly rejected by the ICC and court of appeals. To the extent that petitioners are instead contesting the ICC's findings with respect to the effects on barge competition of the loss of competition between these carriers, CSX and ACL, their claim represents nothing more than a disagreement with the ICC's factual findings, which were upheld by the court of appeals. In either case, petitioners' claims do not warrant this Court's attention.

d. Petitioners also object to the ICC and court of appeals decisions with respect to the second theory advanced by opponents of the CSX/ACL consolidation—that the transaction would enable a merged CSX/ACL to engage in predatory and other anticompetitive practices designed to eliminate its independent barge competitors. Specifically, petitioners argue that the court of appeals erroneously interpreted the Panama Canal Act to allow the ICC to approve the CSX/ACL consolidation so long as it would not drive independent barge carriers out of the market (Pet. 24).

What petitioners ignore is that the Act was intended to preserve barge competition and not to insulate individual water carriers from the burden of competing with railroad-owned barges. The ICC and court of appeals therefore reasonably construed the Act to require dis-

approval of the rail-barge consolidation only when the transaction would result in actual harm to competition, and not when the transaction simply causes particular competitors to experience the routine discomforts associated with intensified competition (Pet. App. 14a). The ICC found in this case that the CSX/ACL consolidation would not injure competition and, in fact, would result in more efficient and competitive transportation services (Pet. App. 143a-145a). Petitioners' protectionist arguments, which merely seek to avoid such enhanced competition, are contrary to the fundamental purposes of the Act.

e. The ICC's decision to retain jurisdiction over the CSX/ACL consolidation and to conduct an annual review of the competitive effects of the transaction further demonstrates that review by this Court is not appropriate. The ICC recently completed its first annual oversight proceeding, and found no basis for doubting the validity of its original conclusions concerning the competitive effects of the consolidation. The ICC's continued monitoring of the instant transaction, as well as its review of any future rail-barge consolidations on a case-by-case basis as contemplated by the Act, eliminate any need for intervention by this Court.[28]

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[28] Denial of review also would not result in a "gap" in antitrust enforcement as petitioners contend (Pet. 17). The Department of Justice, which is responsible for enforcement of federal antitrust laws, participated in the ICC proceedings and proposed a methodology, adopted by the ICC, for assessing the competitive effects of the CSX/ACL consolidation (Pet. App. 70a). Moreover, the CSX/ACL consolidation is exempt from the antitrust laws because of the ICC's findings under Section 11344(d)—the interpretation and application of which petitioners have not challenged in this Court. *See* 49 U.S.C. § 11341(a).

CONCLUSION

The petition for a writ of certiorari in No. 85-2133 and the cross-petition for a writ of certiorari in No. 86-134 should be denied.[29]

Respectfully submitted,

MARK G. ARON
ALAN A. RUDNICK
CSX Corporation
One James Center
Richmond, Virginia 23219

MICHAEL L. HARRIS
MICHAEL A. KHOURI
American Commercial Lines, Inc.
1701 East Market Street
Jeffersonville, Indiana 47130

R. EDEN MARTIN
(Counsel of Record)
G. PAUL MOATES
CARTER G. PHILLIPS
VINCENT F. PRADA
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Respondents
CSX Corporation and American Commercial Lines, Inc.

September 16, 1986

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[29] In No. 86-134, "Cross-Petitioner" Simmons seeks review of the court of appeals' decision upholding the ICC's failure to consider the impact of the CSX/ACL transaction on employees of non-CSX railroads. The short answer to Simmons' argument is that Section 11344(d), on which he bases his claim, contains *no* requirement that the ICC consider the impact of a carrier merger transaction on rail employees, much less employees of railroads not even involved in the transaction. *Cf.* 49 U.S.C. § 11344(b) (consideration of labor impact required in transactions involving merger of two or more class I railroads). Simmons relies on *ICC* v. *Railway Labor Association*, 315 U.S. 373 (1942), and *United States* v. *Lowden*, 308 U.S. 225 (1939), but neither case involved Section 11344(d) and neither involved consideration of the interests of employees not directly affected by the transaction. Accordingly, the issue raised in the cross-petition is utterly without merit.

APPENDICES

APPENDICES

APPENDIX A

STATEMENT REQUIRED BY RULE 28.1

Listed below are all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of CSX Corporation and American Commercial Lines, Inc.:

Allegheny and Western Railway Company
The Baltimore and Cumberland Valley Rail Road Extension Co.
The Baltimore and Ohio Railroad Company
The Baltimore and Philadelphia Railroad Company
The Cincinnati Inter-Terminal Railroad Company
Clearfield and Mahoning Railway Company
The Cleveland Terminal and Valley Railroad Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
The Home Avenue Railroad Company
Mid-Allegheny Corporation
New Gauley Coal Corporation
Richmond, Fredericksburg & Potomac Railroad Company
Richmond-Washington Company
Sea-Land Corporation *
The Winchester and Potomac Railroad Company

* CSX's stock interest in Sea-Land Corporation is presently held in an independent voting trust administered by Midlantic National Bank as trustee.

APPENDIX B

DECISIONS OF THE INTERSTATE COMMERCE COMMISSION APPROVING RAILROAD INTERESTS IN WATER CARRIERS PURSUANT TO 49 U.S.C. § 11321(b)

1. Finance Docket No. 30300, *CSX Corporation—Control—American Commercial Lines, Inc.* (served September 7, 1984), *aff'd sub nom. Crounse Corp.* v. *ICC*, 781 F.2d 1176 (6th Cir. 1986)
2. *Southern Railway Section 5(15) Application*, 342 I.C.C. 416 (1972), *aff'd sub nom. American Waterways Operators, Inc.* v. *United States*, 386 F. Supp. 799 (D.D.C. 1974) (three-judge court), *aff'd sub nom. Water Transport Association* v. *United States*, 421 U.S. 1006 (1975) (per curiam)
3. *Application of Missouri Pacific Railroad Co. and Texas & Pacific Railway Co.*, 245 I.C.C. 143 (1941)
4. *Application of Canadian Pacific Railway Co.*, 225 I.C.C. 81 (1937)
5. *Southern Pacific Company's Ownership of Atlantic Steamship Lines*, 206 I.C.C. 427 (1935)
6. *Investigation of Seatrain Lines, Inc.*, 206 I.C.C. 328 (1935)
7. *Peninsular & Occidental Steamship Co.*, 204 I.C.C. 142 (1934)
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Nos. 85-2133 and 86-134

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

CROUNSE CORPORATION, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

PATRICK W. SIMMONS, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

JOHN J. MCCARTHY, JR.
Deputy Associate General Counsel
Interstate Commerce Commission
Washington, D.C. 20423

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QUESTION PRESENTED

Whether the Interstate Commerce Commission properly authorized the acquisition by a railroad of a water carrier under the Panama Canal Act of 1912, as codified in 49 U.S.C. 11321.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 781 F.2d 1176. The decision of the Interstate Commerce Commission (Pet. App. 47a-210a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1986 (Pet. App. 42a). A petition for rehearing was denied on March 28, 1986 (Pet. App. 43a). The petition for a writ of certiorari in No. 85-2133 was filed on June 26, 1986 and the cross-petition in No. 86-134 was filed on July 28, 1986.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 49 U.S.C. 11321 (a codification of former Section 5(15)-(17) of the Interstate Commerce Act (49 U.S.C. (1976 ed.)) and Section 11 of the Panama Canal Act (ch. 390, 37 Stat. 566)), a railroad may not acquire a competing water carrier unless the Interstate Commerce Commission (ICC) has authorized the transaction. The Commission may authorize such an acquisition if it finds that the transaction "will still allow that water common carrier * * * to be operated in the public interest advantageously to interstate commerce and * * * still allow competition, without reduction, on the water route in question" (49 U.S.C. 11321).

The present case arose when CSX Corporation (which owns several railroads) sought to acquire control of American Commercial Lines, Inc. (ACL) and its subsidiary, American Commercial Barge Lines, Inc., a water carrier (ACBL). In November 1983, CSX and ACL jointly filed an application (Pet. App. 51a) seeking Commission authorization of the ac-

[1] We will refer to petitioners in No. 85-2133 as "petitioners," and to the petitioner in No. 86-134 as "cross-petitioner" or "Simmons."

quisition under 49 U.S.C. (& Supp. II) 11321 and 11344.[2] The Companies asserted that the transaction would result in substantial public benefits (*e.g.*, reduced costs and other advantages of integrated operations), that it would allow intermodal services to be priced more efficiently, and that it would expand shippers' options, thereby generally enhancing the competitiveness of the market (Pet. App. 63a-64a).

After extensive public hearings, the Commission approved the application. The Commission concluded that the Act did not mandate total separation of rail and barge lines. Rather, the Commission ruled, the plain language of the statute and its legislative history confirmed "that Congress intended that these statutory limitations should be used only to prohibit those rail-water combinations which could be expected to have an adverse effect on competition" (Pet. App. 70a). In particular, the Commission concluded that it was not required to deny any application merely because an acquisition might have an adverse impact on one or more competing barge lines, so long as it could not find that the overall level of competition would not be reduced (*id.* at 80a-81a, 187a-188a).[3] "Harm to competitors does not imply harm to competition." *Id.* at 80a.

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[2] Section 11344 requires Commission approval whenever any carrier subject to the Commission's jurisdiction is acquired by another carrier subject to the Commission's jurisdiction.

[3] The Commission said it would no longer follow that part of its decision in *Illinois Cent. R.R.—Control—John I. Hay Co.* (*John Hay*), 317 I.C.C. 39 (1962), that might be read to prohibit an acquisition that adversely affects particular competitors without reducing competition (Pet. App. 80a-81a). The Commission stated that the now-rejected portion

Following the analysis in the Department of Justice Merger Guidelines, the Commission concluded that competition between rail transportation and water carriage is limited because rates and costs are significantly lower for barges than for railroads. For that reason, the Commission focused on water carrier transportation as the relevant product market, considering other modes of transportation when an impact on water rates was shown (Pet. App. 88a-89a). See *id.* at 127a-143a (effect of rail transportation on carriage of coal and agricultural commodities).

The Commission examined whether the proposed transaction would have the foreseeable effect of reducing competition in the barge industry. It first rejected the contention that the common ownership of CSX and ACBL would itself increase concentration to an anticompetitive level (Pet. App. 101a-102a). The barge market consists of hundreds of firms offering line-haul service in the relevant geographic market;[4] those firms can move easily from one part of the system to another and can move into the transportation of different commodities as opportunities for profit appear (*ibid.*). Next, the Commission re-

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of *John Hay* would effectively nullify the Commission's express power, under Section 11321(b), to approve rail acquisitions of water carriers (Pet. App. 80a-81a, 187a-188a).

[4] The Commission defined "the water route in question" as the Mississippi River System and the Gulf Intercoastal Waterway (Pet. App. 90a). Equipment is generally interchangeable throughout these areas and there is no physical barrier to movement throughout these inland waterway systems (*id.* at 195a-198a). Based on the extensive record before it (see *id.* at 94a-101a), the Commission found that the barge industry in the relevant geographic market was "highly competitive" and "not concentrated" (*id.* at 101a).

jected the contention that the transaction would enable CSX to engage in tactics that could allow it to raise its prices above competitive levels. The Commission found that several factors, including the shipper's ability to control the routing of traffic, the lack of economies of scale, and the ease of entry into the barge industry, were sufficient to prevent the post-transaction CSX from diverting from independent barge operators an amount of traffic that would harm competition (Pet. App. 103a-105a).

The Commission also found that the competitive nature of the barge industry would prevent CSX and ACBL from successfully undertaking a strategy of predatory pricing in an effort to drive out competition and achieve a monopoly (Pet. App. 106a). It found that the most significant deterrent to any attempt by CSX-ACBL to dominate the barge industry, or otherwise profit from predatory practices, is the ease of entry into the market, permitting new carriers to enter or re-enter and offer lower rates (*id.* at 107a-114a). It reviewed a substantial body of data indicating that a new entrant of relatively modest size could successfully compete for line-haul business in the geographic market (*id.* at 111a-112a). Thus, natural market forces would "effectively constrain[]" CSX "from successfully engaging in any activity that would reduce competition" (*id.* at 115a).[5] Moreover,

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[5] The Commission also specifically analyzed the effect of the transaction on competition in barge transportation of coal and agricultural commodities (Pet. App. 127-143a) and found that no adverse effect on competition in those markets would result (*id.* at 134a, 137a-140a, 143a).

Finally, the Commission acknowledged that its conclusion that the CSX-ACBL combination will not result in a reduction in competition was predictive in nature and decided to impose

because the applicants had demonstrated that ACBL would continue as an active competitor, the Commission found the transaction also satisfied the remaining requirement of Section 11321(b), that the acquisition "will still allow [that] water common carrier * * * 'to be operated in the public interest advantageously to interstate commerce'" (Pet. App. 120a-121a).[6]

3. The court of appeals affirmed (Pet. App. 1a-41a). The court, adopting the Commission's view, found that the Panama Canal Act was not "a strict prohibition against railroad ownership of bargelines

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extensive oversight and reporting conditions to permit it to monitor the approved transaction for anticompetitive consequences and take remedial action if warranted (Pet. App. 145a-147a, 208a-210a). On August 25, 1986, the Commission entered a decision in the oversight proceeding, in which it concluded that the record "fails to show that the consolidation has reduced competition on ACBL's water routes or elsewhere", and that "the record shows that the consolidation has increased beneficial competition by allowing CSX and ACL to introduce new intermodal price and service options." Finance Dkt. No. 30300 (Aug. 25, 1986), slip op. 2.

[6] The Commission also concluded (Pet. App. 122a-127a) that approval was appropriate under Section 11344(d), which provides, in pertinent part, that "the Commission shall approve * * * an application unless it finds that—(1) as a result of the transaction, there is likely to be substantial lessening of competition * * *." Section 11344(d) was added by the Staggers Rail Act of 1980, Pub. L. No. 96-448, § 228(b), 94 Stat. 1931, and provides a less stringent standard of approval for consolidations that do not involve two class I rail carriers. See H.R. Conf. Rep. 1430, 96th Cong., 2d Sess. 120 (1980); Pet. App. 81a-82a (discussing the appropriate factors for consideration when Section 11344(d) governs).

In addition, the Commission imposed statutorily-required labor protective conditions for the benefit of CSX railroad employees (Pet. App. 53a). Consistent with recent precedents, the Commission refused to extend this protection to include employees of other railroads (*id.* at 149a-150a).

* * * [but a statute] meant to remedy a particular evil which frequently accompanied railroad acquisition of bargelines" (*id.* at 6a-7a), *i.e.*, reduction of rates to eliminate barge competition and subsequent raising of rates after water competition has been eliminated (*id.* at 7a-11a). The Court also found that the Commission had correctly construed the Act "to require an actual reduction in competition as opposed to simply harm to particular bargelines due to intensified competition" (*id.* at 14a).

In assessing the Commission's application of the Act, the court deferred to the Commission's factual findings and declined to reweigh the evidence. Since substantial evidence supported the Commission's definitions of the relevant product and geographic markets (Pet. App. 16a-17a) and its findings that predatory pricing would not succeed where there is well-financed competition in an industry with low barriers to entry (*id.* at 20a-21a), the court accepted the Commission's conclusion that water carrier competition would not be reduced by the merger (*id.* at 21a).

The court of appeals also affirmed the Commission's conclusion that protective conditions were not required for the benefit of non-CSX rail employees (Pet. App. 25a-26a). See note 6, *supra.*

Judge Timbers dissented. In his view, the direct competition between CSX and ACL (Pet. App. 34a-35a) should have triggered a different analysis and result under the Panama Canal Act.

ARGUMENT

The court of appeals correctly affirmed the interpretation of the Act by the agency charged with administering it and correctly concluded that the agency's findings were supported by substantial evidence.

These conclusions do not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners contend (Pet. 12-17) that the Act was "designed to prohibit * * * common ownership" of rail and water carriers (*id.* at 13). The court of appeals correctly and unanimously rejected that interpretation (Pet. App. 6a-10a, 33a), finding that "Congress intended only to end the specific anti-competitive practice which prompted it to act. Congress declined to go further and enact the strict prohibition * * * petitioners now ask us to read into the Act" (*id.* at 9a).

As the court of appeals noted, this conclusion was supported by the legislative history of the Panama Canal Act (Pet. App. 7a-8a); the statutory language (*id.* at 8a-9a); early Commission decisions (*id.* at 9a-10a); and the reenactment of the statute in the Transportation Act of 1940 ("[T]he debates reveal some sentiment for * * * rail-barge separation * * * but that sentiment did not find its way into the statute as []enacted" (Pet. App. 10a)).[7] In addition,

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[7] Petitioners' argument (Pet. 21-23) that the 1940 legislation undercuts the ICC's interpretation is incorrect. The Transportation Act of 1940 amended the Panama Canal Act by giving the Commission specific authority to authorize "acquisitions" of water carriers. See former Section 5(17); *Water Transport Ass'n* v. *ICC*, 715 F.2d 581, 590 (D.C. Cir. 1983), cert. denied, 465 U.S. 1006 (1984) (*WTA*). This was done, according to the Conference Report, to "make[] more certain the authority of the Commission, in connection with which there ha[d] apparently been [some] doubt, with respect to the installation of new service." H.R. Conf. Rep. 2832, 76th Cong., 3d Sess. 69 (1940). See *WTA*, 715 F.2d at 589 n.20; Pet. App. 10a (emphasis in original) ("a change [of] wording intended to clarify that the [exemption would]

the court commented (*ibid.*) that its ruling was in accord with the decision of "the only court to consider the question since the 1940 reenactment" (see *Water Transport Ass'n* v. *ICC*, 715 F.2d 581, 590

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be applied not only to applications for *continuing* joint operation, but also to application[s] for *new* joint operation[]"). Thus, the 1940 legislation was intended to make it clear that the Commission did have power to authorize rail-barge combinations, the antithesis of petitioners' contention.

Petitioners also err in attributing to the Commission (Pet. 22) the longstanding view that the Act "prohibited railroads from owning water carriers in competition with rail routes." That had never been the Commission's interpretation of the Act.

The court of appeals traced Commission decisions back to 1915 (Pet. App. 9a-10a). It noted that in *Lake Line Applications Under Panama Canal Act*, 33 I.C.C. 700 (1915), the Commission relied on public interest grounds to deny continued rail-water ownership rather than on "a perceived strict mandate of rail-barge separation" (Pet. App. 9a). Indeed, in *Ocean Steamship Co.*, 37 I.C.C. 422 (1915), the Commission permitted a railroad to continue its ownership of a steamship line with which it competed (see Pet. App. 9a-10a). See *Southern Pacific Company's Ownership of Atlantic Steamship Lines*, 77 I.C.C. 124 (1923) (Commission approved railroad's ownership of a new competing water service); *Investigation of Seatrain Lines, Inc.*, 206 I.C.C. 328 (1935) (approving two railroads' ownership of a new water carrier that competed with the railroads).

In *WTA*, which also arose out of the CSX-ACL transaction (see note 8, *infra*), the District of Columbia Circuit also reviewed the history of the ICC's interpretation of the Act and rejected petitioners' wooden view that the statute requires absolute separation of rail and barge ownership (*WTA*, 715 F.2d at 588). As the court concluded in *WTA* (*ibid.*), petitioners' interpretation is erroneous in light of Congress's endorsement of the Commission's position, and expansion of Commission authority, in the 1940 legislation.

(D.C. Cir. 1983), cert. denied, 465 U.S. 1006 (1984).[8] Had Congress intended to create an absolute bar to rail acquisition of barge lines it knew how to do so; it certainly would not have created a mechanism for Commission approval if all such transactions were prohibited (see Pet. App. 11a).

The court of appeals also correctly rejected petitioner's contention (Pet. 12-16) that the Commission was required to disapprove the transaction if there would be *any* reduction of rail-barge competition (as distinct from barge-barge competition). Petitioners argued that since the merger would obviously eliminate competition between CSX and ACBL, there would necessarily be a "reduction in competition under the Act," precluding Commission approval (Pet. App. 11a). But, as the court of appeals recognized, the Act refers only to reductions in competition "on the water route in question," and a reduction in rail-barge competition is relevant only insofar as it affects competition on the water route. As the court discerned, petitioners' contention is just another way of stating their erroneous position that the Act bars all mergers between competing rail and barge lines. The Act requires Commission approval only of mergers between *competing* rail and barge lines, and provides for such approval if there is no reduction of competition on the water route. Petitioners' theory would preclude approval of any merger of formerly competing rail and barge lines and would thus read

[8] *WTA* arose from the same transaction that is at issue here. When the acquisition was first proposed, CSX and ACL sought to place the stock of ACBL in an independent voting trust pending Commission approval of the acquisition. The District of Columbia Circuit upheld the Commission's determination that the voting trust arrangement was permissible.

the approval mechanism out of the statute (Section 11321(b)). See *Texas Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) ("the act cannot be held to destroy itself").[9]

There is no merit to petitioners' converse contention that the Commission and the court erroneously disregarded rail-barge competition altogether. As the court recognized, the Commission considered rail-barge competition "to the extent that [such competition] effectively disciplined barge rates on the routes in question" (Pet. App. 16a, 87a-88a). Competition from rail transportation was specifically discussed in assessing the effects of the proposed transaction on separate commodity markets, such as coal (*id.* at 127a-134a) and agricultural commodities (*id.* at 134a-143a). The court correctly held (Pet. App. 21a) that in light of the Commission's finding, supported by substantial evidence, that rail-barge competition in the relevant area was limited (*id.* at 88a), the consideration given to such competition was ample to satisfy the statutory standard.[10]

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[9] Similarly, there is no merit to petitioners' contention (Pet. 24) that the decision below would permit the Commission to approve any merger so long as barge competition was not totally eliminated. Neither the court nor the Commission adopted the "destruction" of competition standard petitioners envision. Rather, as the court stated (Pet. App. 14a): "In the instant case, the Commission construed the Act to require an actual reduction in competition as opposed to simply harm to particular bargelines due to intensified competition."

[10] While petitioners challenge language in the court's opinion that, they contend, would eliminate any examination of rail-barge competition, it is clear that the court did not dispense with such competitive analysis. Moreover, the Commission expressly addressed rail-barge competition when, on the facts in this case, such an inquiry was warranted. As

2. Petitioners' other principal argument is that this particular transaction should not have been approved. That is essentially a fact-based contention, and there is no reason for this Court to reweigh the evidence underlying the factual findings on which the Commission and the court below concurred.

The essence of this contention appears to be that the Commission and the court paid too little attention to effects on particular barge competitors. But the court understood Congress's purpose: to be sure that shippers would continue to have a "genuine [barge] alternative to rail [service]" (Pet. App. 7a). The Act's concern, and the Commission's, was to preserve competition—not, as petitioners were demanding, to preserve the position of every existing barge line. The court correctly concurred (*id.* at 19a): "[H]arm to competitors [need not] translate into harm to competition * * *. That some competitors may suffer a reduction in traffic does not mean that the competition which benefits shippers will be diminished to any degree."

3. Petitioners' final contention (Pet. 23) is that approval of the CSX-ACL acquisition "effectively repealed" the Act. But, as the court of appeals recognized, the Commission did nothing of the sort: "[t]he Act remains in full force and the Commission, of course, will continue to analyze acquisitions under the Act on a case-by-case basis" (Pet. App. 11a). Should an acquisition be proposed where the likely

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a result, even if petitioners' objection to the language in the opinion below were well-founded it would not alter the judgment. And, to the extent that petitioners contend that greater emphasis should have been given to rail-barge competition, that is a factual question—within the Commission's area of expertise—that does not warrant this Court's consideration.

effect is reduction of competition on the water route, the Commission retains its full statutory power to act.

As the Commission and the court recognized, the economics of the transportation industry are far different today from what they were in 1912. This Court has indicated that the Commission is to exercise "flexibility and adaptability to changing needs and patterns of transportation." *American Trucking Associations* v. *Atchison T. & S.F. Ry.*, 387 U.S. 397, 416 (1967). Rail-barge mergers that might have reduced competition on the water route 70 years ago will not necessarily create anticompetitive results today. The Commission's decision in this case discharged its statutory duty in a way that responsibly accommodates federal authority to present economic conditions.[11]

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[11] The questions presented in the cross-petition are insubstantial. We note first that, contrary to cross-petitioner's assertion (Cross-Pet. 6), Rule 20.5 of the Rules of the Supreme Court precludes consideration of the cross-petition if the petition in No. 85-2133 is denied. With respect to the merits of the cross-petition, Simmons appears to be contending that the Commission is not foreclosed from considering the interest of non-CSX employees. But the court of appeals did not rule that such employees "cannot be considered" (Cross-Pet. 10). It ruled on, and rejected, cross-petitioner's argument, based on *Detroit, Toledo & Ironton R.R.* v. *United States*, 725 F.2d 47 (6th Cir. 1984), that Section 11344(b)(1)(D) applied and, accordingly, that the Commission was *required* to consider the interests of employees of nonparticipating railroads (Pet. App. 24a-25a). Since Simmons now concedes that Section 11344(b)(1)(D) does not apply (Cross-Pet. 11-12), there is no intracircuit conflict within the Sixth Circuit. Even if such a conflict existed, it would be a matter for the court of appeals to resolve. Cross-petitioner's second contention (*id.* at 12-14)—based on a hypothetical case involving two class I rail carriers—is even less deserving of review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

JOHN J. MCCARTHY, JR.
Deputy Associate General Counsel
Interstate Commerce Commission

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PETITIONERS' REPLY BRIEF

RICHARD A. ZELLNER
MARK E. STAIB
SMITH R. BRITTINGHAM, III
HAHN LOESER & PARKS
800 National City E. 6th Bldg.
Cleveland, Ohio 44114

A. DUNCAN WHITAKER, P.C.
ALAN M. WISEMAN
ROBERT M. BRUSKIN
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JAMES F. BROMLEY
BROMLEY, BROWN & WALSH
1625 Eye St., N.W.
Washington, D.C. 20006

WILLIAM L. PATTON
Counsel of Record
THOMAS H. HANNIGAN, JR.
ROPES & GRAY
225 Franklin Street
Boston, MA 02110
(617) 423-6100

WILLIAM E. HYNAN
PETER A. GABAUER
1130 17th St., N.W.
Washington, D.C. 20036

NICHOLAS J. SPAETH
LYNN L. SCHLOESSER
MARY ANN JOHNSON
State Capital
Bismark, N. Dakota 58505

Counsel for Petitioners

Blanchard Press, Inc., Boston, Mass. — Law Printers [617] 426-6690

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In the
Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2133

CROUNSE CORPORATION, ET AL.,
PETITIONERS,

v.

INTERSTATE COMMERCE COMMISSION, ET AL.,
RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

1. Respondents CSX and ICC attempt to characterize the questions presented by petitioners as essentially factual, requiring this Court to review the extensive administrative record and findings made below. That is simply not so. The questions which petitioners ask this Court to review are fundamental questions of law involving the proper interpretation of the Panama Canal Act, a statute which since 1912 has guaranteed vigorous competition between rail and water carriers in this country. The questions of law presented concern the essential purpose of the Act and the proper scope of its exception, and they have sharply divided the judiciary throughout this case.[1]

[1] Judge Greene dissented from the decision of the District of Columbia Circuit approving CSX's use of a voting trust to hold the stock of ACL pending ICC approval; he stated in his dissent that the merger of CSX and ACL

CSX and ICC misstate petitioners' position. Petitioners do not argue, as CSX and ICC suggest, that the Act contains an absolute prohibition on rail-barge mergers. Quite the contrary, petitioners recognize the Act contains an exception, but their position is that the exception is precisely that, an exception. Consistent with the intended purpose of the Act to preserve rail-barge competition, Congress deliberately prohibited railroads from acquiring competing water carriers excepting only those acquisitions satisfying a stringent test that competition not be reduced. The Court of Appeals has fundamentally misconstrued the Act and its exception by holding that the ICC need not consider the impact of a rail-barge merger on rail-barge competition.

2. Respondents do not even agree among themselves as to whether the Court of Appeals correctly interpreted the Act. CSX parrots the Court's simplistic analysis that "[b]arges, not trains, operate on water routes," and restates its conclusion that the ICC need not consider rail-barge competition at all but can limit its consideration to barge-barge competition (CSX Br. 16).

The ICC, by contrast, is apparently unwilling to embrace the Court of Appeals' analysis and conclusion. It all but concedes the petitioners' challenge is well-founded (ICC Br. 11 n.10). But the ICC suggests the Court of Appeals did not mean what it said, *i.e.*, that the Court did not *really* mean that the ICC can completely ignore rail-barge competition. However, the language of the majority opinion admits of no such interpretation. The Court of Appeals held, as a matter of law, that the ICC was not required to consider the impact of the merger on rail-barge competition (App. A, 13a).

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must ultimately be disapproved by the ICC when reviewed under the Act "unless the ICC should at that time again apply its own policy rather than the congressional view of the proper relationships in the rail-water market." *Water Transport Association* v. *ICC*, 715 F.2d 581, 601 & n.25 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984). In the Sixth circuit, Judge Timbers dissented from the majority opinion (App. A, 32a) and four other judges dissented from the denial of rehearing *en banc*, with Judge Merritt authoring a four-page dissenting opinion (App. D, 44a).

The ICC then attempts to downplay the importance of any error in the Court of Appeals' construction of the Act by arguing that the Commission did in fact consider the impact of the CSX/ACL merger on rail-barge competition (ICC Br. 11). But if there is anything the judges in the Court of Appeals agreed upon, it is that the ICC failed to consider the acquisition's impact on rail-barge competition. The majority opinion expressly stated that the ICC "looked *only* at the effect the merger would have on competition among water carriers, and *ignored the effect on rail-barge competition.*" (App. A, 5a) (emphasis added). Judge Timbers in his dissent stated that the "essential, and fatal, error upon which the ICC's decision is based, is its utter failure to consider the effect of this acquisition on *competition between railroads and bargelines.*" (App. A, 33a) (emphasis added). In his dissent from the denial of rehearing *en banc*, Judge Merritt, joined by three other judges, flatly stated that the ICC "refused to look at what effect the merger . . . will have on *rail-barge competition* . . . ." (App. D, 45a) (emphasis added).[2] Thus, not only did the Court of Appeals misinterpret the Act, but the findings with respect to rail-barge competition which would have been necessary under the correct interpretation were simply not made by the agency.[3]

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[2] Contrary to the ICC's contention (ICC Br. 11), the Court of Appeals nowhere held that the ICC's consideration of rail-barge competition "was ample to satisfy the statutory standard."

[3] CSX takes issue with the Court of Appeals in a different respect. The Court of Appeals held that predatory pricing was the only evil addressed by the Act (App. A, 7a-9a). CSX concedes that predatory pricing was just one of a number of practices used by railroads to harm independent barge lines prior to 1912, practices which motivated Congress to pass the Act. CSX Br. 13-14. However, CSX suggests the Court of Appeals did not really intend to hold that predatory pricing was the sole evil addressed by Congress. The difficulty with that position is that the Court of Appeals said just that, and it also said that if Congress had a broader purpose, then the petitioners' arguments had merit (App. A, 9a-10a).

The inability of respondents to agree with the Court of Appeals, or even with each other, as to the proper interpretation of the Act underscores the importance of the questions of law presented by petitioners in this case and the need for plenary review by this Court.

3. At the heart of the legal issues raised in this case is the question whether the Act was designed to promote rail-barge competition, or simply competition among barge lines. CSX concedes that "Congress in 1912 was concerned with possible railroad domination of barge carriers and with the exploitation of railroad-owned vessels to drive independent water carriers out of business." (CSX Br. 16). CSX concludes from that history, however, that the Act was thus clearly aimed at preserving "barge competition" and that the ICC could thus focus its competitive analysis on the "barge industry." That conclusion simply does not follow. If Congress was concerned with protecting barge lines from railroads, it was manifestly concerned with rail-barge competition, not barge competition in the abstract.

The ICC's own decisions, including a decision by the ICC at an earlier stage of this case, state that the fundamental purpose of the Act was to preserve rail-water competition:

> The debates . . . in the House and Senate also clearly demonstrate that Congress had in mind relationships potentially adversely affecting *rail-water competition* . . . . In sum, the test of whether an interest is prohibited . . . is whether the relationship enables the railroad to adversely affect *competition from water carriers* . . . .

Water Transport Association—Petition for Declaratory Order—American Commercial Lines Voting Trust, 367 I.C.C. 559, 565-66 (1983) (emphasis added), *aff'd sub nom. Water Transport Association* v. *ICC*, 715 F.2d 581 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984). The District of Columbia Circuit in the voting trust case also concluded that the

Act was designed "to preserve rail-water competition by barring railroads from owning or controlling competing water carriers." 715 F.2d at 587. It defies logic to suggest, as CSX does, that a statute designed to protect rail-barge competition, and triggered by the existence of such competition, can be construed to dispense with an analysis of such competition.

4. CSX cites in Appendix B to its brief some 34 ICC decisions since 1912 approving "rail interests in competing water carriers." (CSX Br. 14 n.21). Not even the ICC offers such sweeping generalizations of its prior cases, and with good reason. The cases cited by CSX were not even remotely close to the transaction approved in this case.

The first case listed by CSX is this case. Of the remaining cases, there are instances where the ICC found the rail and water carriers did not even compete, and thus there was no need to consider the Act's exception.[4] Nineteen of the cases listed, including the three cases CSX asserts involved "railroad interests in substantial water carrier operations" (CSX Br. n.21), have previously been categorized by the ICC itself as cases in which "the Commission regarded the railroad interest in the water carrier as an extension of the railroad's route or as a means of bridging lakes or bays between rail points." *Southern Railway Co.*, 342 I.C.C. 416, 441 (1972). The rest of the cases involved situations where the reduction in competition was immaterial, including cases where the rail-owned water carriers provided an essential service and the application was not opposed,[5] or where the railroad owned only a minority interest in a water carrier.[6]

The prior ICC decisions cited by CSX are consistent with petitioner's position that the Act's exception is a stringent one. In no case prior to this one has the ICC approved a railroad interest in a water carrier where the competition involved

[4] *E.g.*, *Canadian Pacific Railway Co.*, 225 I.C.C. 81, 86 (1937).

[5] *E.g.*, *Southern Pacific Co.*, 34 I.C.C. 174, 176 (1915); *compare Southern Railway Co.*, *supra*, 342 I.C.C. at 442 n. 8 *with* the analysis at note 18 of the I.C.C.'s decision in this case (App. E, 79a & n. 18).

[6] *E.g.*, *Missouri Pacific Railroad Co.*, 245 I.C.C. 143, 150-151 (1941).

parallel rail and water lines and where the competition was of the magnitude involved between CSX and ACL. Indeed, this is the first acquisition of a competing water carrier allowed in the history of the Act.[7] The ICC itself conceded that "in many respects this is a case of first impression. . . ." (App. E, 145a).

5. The legal issues concerning the proper interpretation of the Act warrant this Court's attention in this case. If the merger of the nation's largest barge line with the nation's second largest railroad can satisfy the Act's exception, then no other rail-barge merger can fail to pass muster, and the ICC will have effectively nullified the Act. Given the nature of the prior competition between CSX and ACL, approval of this merger necessarily will establish the bounds of the exception at a point which effectively swallows the rule.

The ICC suggests that economic conditions have changed in the transportation industry since the Act was passed in 1912 (ICC Br. 13). Of course those conditions have changed, but the fact is they have changed in a way which makes application of the Act more imperative than at any point in its history. Since 1912 the number of major railroads in the eastern United States has steadily decreased to the point that today there are only three Class I railroads in the east, and only seven in the entire country, each basically serving separate regions (*See* Pet. Br. 10 & n.8). Thus, the railroads with which independent water carriers must compete are larger and more powerful than ever before. Although the number of water carriers has increased since 1912, that is simply proof the Act has worked as Congress intended, not a signal to abandon it. In any event, any decision to repeal the Act is for Congress, not the ICC.

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[7] As CSX recognizes, the other cases cited by CSX involved attempts by railroads to resist the mandate of divestiture imposed by the Act (itself a remarkable phenomenon in the history of antitrust legislation) for water carriers owned prior to 1912, or attempts to start new water carriers or service.

Respondents point to the oversight proceedings as a cure-all for whatever deficiencies exist. They suggest that the requirements of the Act are satisfied so long as the ICC retains jurisdiction. But the ICC has no power to conditionally approve a rail-barge merger. That approach was specifically rejected by Congress in 1912 and by the ICC in early decisions under the Act (*See* Pet. Br. 4 n.6, 19 n.12). Moreover, the use of oversight is contrary to the essential premise of the Act—Congress presumed that anti-competitive practices are inherent in a rail-barge combination and therefore banned the structure which permitted them, with a stringent exception. The ICC in effect has administratively overturned that congressional premise and taken it upon itself to presume the opposite, *i.e.*, that railroads are not likely to engage in anti-competitive practices if allowed to acquire competing barge lines today.[8]

Respondents suggest that the merger will actually increase competition by allowing CSX and ACL to compete more effectively for waterborne traffic (CSX Br. 8, 11; ICC Br. 5 n.5). Respondents assert that the merger allows CSX/ACL to provide single-system shipping, to introduce new intermodal price and service options, and to achieve substantial cost savings and increased productivity, all of which they say will provide shippers with the convenience of dealing with one carrier and the possibility of lower rates (*Id.; see also* App. E, 57a-62a, 143a-145a). But such benefits were rejected by the ICC in prior decisions as an adequate basis for approval under the Act (*See* Pet Br. 19 & n.12). Moreover, these benefits are, by the ICC's analysis, available only to the rail-barge combination.[9]

[8] The ICC offers the difference in rail and water rates as a justification for failing to analyze rail-barge competition (ICC Br. 4). As CSX admits, however, water rates were also lower than rail rates when Congress passed the Act (CSX Br. 13), which condition was the motivation for railroads to acquire water carriers and attempt to drive out independent water carriers.

[9] As a matter of fact, most of the benefits of joint operation perceived by the ICC could have been achieved before the merger as the result of contracts between rail and water carriers. Petitioners do not seek to prevent the offering of innovative services to shippers, but rather to compete in a market in which all barge carriers can compete on equal terms, with resulting benefits to shippers.

Thus, the effect of the ICC's approval will be to confer upon a single consolidated entity a permanent competitive advantage which no independent barge line can match no matter how hard it tries.

Judge Timbers accurately predicted the inevitable result of this decision in his dissenting opinion:

> Finally, the assumption that other barge carriers will have a nearly equal opportunity to compete with ACL for CSX-generated traffic is belied by the ICC's heavy emphasis on the supposed "efficiencies" that will result from this merger. If those "efficiencies" are as great as the ICC suggests, other water carriers will not be able to compete effectively with ACL even if given the opportunity; and, it can be predicted, the ICC will rely in the future on this imbalance to justify mergers of other water carriers with railroads, ultimately defeating Congress' goal of separate ownership of water and rail carriers.

(App. A, 38a). The respondents assert that approval of this particular rail-barge merger does not guarantee that all rail-barge mergers will hereafter be approved.[10] They suggest the

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[10] Both CSX and ICC suggest that this is a routine transaction of no consequence. CSX asserts, for example, that the barge market is relatively unconcentrated and that ACL's share of the market is less than 7% (CSX Br. 5, 6 n.8). That, of course, is based simply on the ICC's aggregation of data concerning all barge activity of whatever nature occurring anywhere in the eastern half of the country. It does not rest on any principled analysis of relevant product and geographic markets. Under a correct interpretation of the statute and established principles of market definition, the combined post-merger shares of ACL and CSX in several commodity and geographic markets are dramatic. For example, prior to the acquisition CSX had a 48.3% market share of all coal moved by Class I railroads in the east (App. A, 2a); ACL, even accepting the ICC's figures, was among the top four coal-carrying barge lines which together accounted for about one-half of all barge-coal traffic (App. E, 129a). As a result of the merger, CSX/ACL achieved market shares exceeding 50%, and in some cases reaching 80%, for coal moving from commonly served orgins to particular states. For eastern coal moving to Kentucky, for example, CSX/ACL achieved a market share of 60%, with a

Act will continue to have vitality and that the ICC will assess each case on its own merits (CSX Br. 21; ICC Br. 12). But consider the result if the ICC did in fact refuse to approve the next rail-barge merger involving an independent barge line on the water system served by CSX/ACL. That would have the exceedingly perverse result that CSX/ACL would be the *only* carrier permitted to enjoy the unique competitive advantages of joint operation. Certainly the ICC could not permit that to happen and Judge Timbers is thus correct that further rail-barge mergers are inevitable.

Because of the severe contraction in Class I railroads, the number of railroad partners for independent water carriers will be small and the number of possible rail-barge combinations limited, restricting shippers options. Moreover, because the remaining Class I railroads today each basically serve separate regions of the country, shippers will be unable to obtain the benefits of using independent water carriers in areas served predominately by CSX. Judge Merritt focused on this problem in his dissent from the Sixth Circuit's refusal to allow rehearing *en banc:*

> The railroad in question controls 50% of the barge terminals on the river system in question, and all of the terminals on large stretches thereof. If, after buying the barge line in question, the railroad restricts the use of its terminals to that barge company, it will eliminate competition among barge lines that haul coal and other commodities to and from those terminals. Given the number of termi-

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post-merger Herfindahl-Hirschman Index ("HHI") of 3,660, and an increase in HHI of 595. Such HHI's would signal dangerous reduction in competition under the Department of Justice merger guidelines.

Petitioners do not, however, ask this Court to engage in a review of such data, nor is such review necessary to decide the questions of law presented here. Due to a fundamental misconstruction of the Act, analysis of figures concerning rail-barge competition did not form the basis for the decisions by the Court of Appeals and ICC below, and the figures are cited by petitioners only to illustrate the fundamental flaw in the decision below.

nals involved, it is inconceivable that the merger in question will not result in a reduction of competition on the water routes in question.

(App. D, 45a).

It is for these reasons petitioners argue that the Court of Appeals' decision, if allowed to stand, will fundamentally alter the nature of the transportation industry in this country. This case may well be the last case and it demands this Court's review.

Respectfully submitted,

RICHARD A. ZELLNER
MARK E. STAIB
SMITH R. BRITTINGHAM, III
HAHN LOESER & PARKS
800 National City E. 6th Bldg.
Cleveland, Ohio 44114

A. DUNCAN WHITAKER, P.C.
ALAN M. WISEMAN
ROBERT M. BRUSKIN
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JAMES F. BROMLEY
BROMLEY, BROWN & WALSH
1625 Eye St., N.W.
Washington, D.C. 20006

WILLIAM L. PATTON
Counsel of Record
THOMAS H. HANNIGAN, JR.
ROPES & GRAY
225 Franklin Street
Boston, MA 02110
(617) 423-6100

WILLIAM E. HYNAN
PETER A. GABAUER
1130 17th St., N.W.
Washington, D.C. 20036

NICHOLAS J. SPAETH
LYNN L. SCHLOESSER
MARY ANN JOHNSON
State Capital
Bismark, N. Dakota 58505

Counsel for Petitioners

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